CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 32 DECEMBER 2, 1998 NO. 48

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

General Notices

PROPOSED COLLECTION; COMMENT REQUEST

REQUEST FOR INFORMATION

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning Request for Information. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before January 15, 1999, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Group, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue, NW, Room 3.2C, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will

be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Request for Information

OMB Number: 1515–0068

Form Number: Customs Form 28

Abstract: Customs Form 28 is used by Customs personnel to request additional information from importers when the invoice or other documentation provide insufficient information for Customs to carry out its responsibilities to protect revenues.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Businesses, Individuals, Institutions

Estimated Number of Respondents: 60,000

Estimated Time Per Respondent: 30 minutes

Estimated Total Annual Burden Hours: 30,000

Estimated Total Annualized Cost on the Public: N/A

Dated: November 9, 1998.

J. EDGAR NICHOLS,
Team Leader,
Information Services Group.

[Published in the Federal Register, November 16, 1998 (63 FR 63773)]

PROPOSED COLLECTION; COMMENT REQUEST

CERTIFICATE OF COMPLIANCE FOR TURBINE FUEL WITHDRAWALS

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Certificate of Compliance for Turbine Fuel Withdrawals. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before January 15, 1999, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Group, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue, NW, Room 3.2C Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Certificate of Compliance for Turbine Fuel Withdrawals

OMB Number: 1515–0209

Form Number: N/A

Abstract: This information is collected to ensure regulatory compliance for Turbine Fuel Withdrawals to protect revenue collections.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Businesses, Individuals, Institutions

Estimated Number of Respondents: 20

Estimated Time Per Respondent: 12 hours

Estimated Total Annual Burden Hours: 240

Estimated Total Annualized Cost on the Public: N/A

Dated: November 9, 1998.

J. EDGAR NICHOLS,
Team Leader,
Information Services Group.

[Published in the Federal Register, November 16, 1998 (63 FR 63773)]

PROPOSED COLLECTION; COMMENT REQUEST

ENTRY OF ARTICLES FOR EXHIBITION

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning Entry of Articles for Exhibition. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before January 15, 1999, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Group, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue, NW, Room 3.2C, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Entry of Articles for Exhibition

OMB Number: 1515–0106

Form Number: N/A

Abstract: This information is used by Customs to substantiate that the goods imported for exhibit have been approved for entry by the Department of Commerce.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)
Affected Public: Businesses, Individuals, Institutions
Estimated Number of Respondents: 40
Estimated Time Per Respondent: 20 minutes
Estimated Total Annual Burden Hours: 530
Estimated Total Annualized Cost on the Public: N/A

Dated: November 9, 1998.

J. EDGAR NICHOLS,
Team Leader,
Information Services Group.

[Published in the Federal Register, November 16, 1998 (63 FR 63774)]

QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS ON CUSTOMS DUTIES

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: This notice advises the public of the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts and refunds of Customs duties. For the quarter beginning October 1, 1998, the rates will be 7 percent for overpayments and 8 percent for underpayments. This notice is published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: October 1, 1998.

FOR FURTHER INFORMATION CONTACT: Ronald Wyman, Accounting Services Division, Accounts Receivable Group, 6026 Lakeside Boulevard, Indianapolis, Indiana 46278, (317) 298–1200, extension 1349.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the Federal Register on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of Customs duties shall be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Interest rates are determined based on the short-term Federal rate. The interest rate that Treasury pays on overpayments will be the short-term Federal rate plus two percentage points. The interest rate paid to the Treasury for underpayments will be the short-term Federal rate plus three percentage points. The rates will be rounded to the nearest full percentage.

The interest rates are determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury based on the average

market yield on outstanding marketable obligations of the U.S. with remaining periods to maturity of 3 years or less, and fluctuate quarterly. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 98–46 *(see,* 1998–39 IRB 10, dated September 28, 1998), the IRS determined that the rates of interest for the first quarter of fiscal year (FY) 1999 (the period of October 1–December 31, 1998) will be 7 percent for overpayments and 8 percent for underpayments. These interest rates are subject to change for the second quarter of FY–1999 (the period of January 1–March 31, 1999).

For the convenience of the importing public and Customs personnel the following list of Internal Revenue Service interest rates used, covering the period from before July of 1974 to date, to calculate interest on overdue accounts and refunds of Customs duties, is published in summary format.

Beginning Date Prior to	*Ending Date*	*Under-payments*	*Over-payments*
070174	063075	6 %	6 %
070175	013176	9 %	9 %
020176	013178	7 %	7 %
020178	013180	6 %	6 %
020180	013182	12 %	12 %
020182	123182	20 %	20 %
010183	063083	16 %	16 %
070183	123184	11 %	11 %
010185	063085	13 %	13 %
070185	123185	11 %	11 %
010186	063086	10 %	10 %
070186	123186	9 %	9 %
010187	093087	9 %	8 %
100187	123187	10 %	9 %
010188	033188	11 %	10 %
040188	093088	10 %	9 %
100188	033189	11 %	10 %
040189	093089	12 %	11 %
100189	033191	11 %	10 %
040191	123191	10 %	9 %
010192	033192	9 %	8 %
040192	093092	8 %	7 %
100192	063094	7 %	6 %
070194	093094	8 %	7 %
100194	033195	9 %	8 %
040195	063095	10 %	9 %
070195	033196	9 %	8 %
040196	063096	8 %	7 %
070196	033198	9 %	8 %
040198	123198	8 %	7 %

Dated: November 10, 1998.

RAYMOND W. KELLY,
Commissioner of Customs.

[Published in the Federal Register, November 16, 1998 (63 FR 63744)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, November 18, 1998.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION AND MODIFICATION OF RULING LETTERS RELATING TO HEATING AND COOLING PADS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification or revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify or revoke three rulings pertaining to the tariff classification of heating and cooling pads, under the Harmonized Tariff Schedule of the United States (HTSUS). Comments are invited on the correctness of the proposed rulings.

DATE: Comments must be received on or before January 4, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulation and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Michael McManus, General Classification Branch, (202) 927–2346.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify or revoke a ruling pertaining to the tariff classification of several heating and cooling pads.

In New York Ruling Letter (NY) A83830, issued May 31, 1996, Customs ruled that "PitPacs" hot and cold pads were classified in subheading 3005.90.5090, HTSUS. In NY 806312, issued February 16, 1995, Customs ruled that "Cool Paks" hot and cold pads were classified in subheading 3005.90.5090, HTSUS. In NY 813748, issued August 29, 1995, Customs ruled that the "Magic Bag" hot and cold pad was classified in subheading 3005.90.5090, HTSUS. NY A83830, NY 806312, and NY 813748 are set forth as Attachements A,B, and C, respectively.

It is now Customs position that these articles are not classified in heading 3005, HTSUS. To be classifiable in this heading, an article must have a medical purpose. The instant goods purport to have a tonic effect, however, such effect does not rise to the level of a medical purpose. Instead, these goods are classified according to the component which supplies the essential character to the good. Proposed HQ 961089, revoking NY A83830, HQ 962352, modifying NY 806312, and HQ 962353, revoking 813748, are set forth as Attachments D, E, and F, respectively. Before taking this action, we will give consideration to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: November 13, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, May 31, 1996.

CLA–2–30:RR:NC:FC:238 A83830
Category: Classification
Tariff No. 3005.90.5090

MR. JOHN SVEUM
TOWER GROUP INTERNATIONAL, INC.
P.O. Box 269
Sweetgrass, MT 59484

Re: The tariff classification of **"PitPacs"** Hot & Cold Comfort Pacs, from Canada.

DEAR MR. SVEUM:

In your letter dated May 13, 1996, on behalf of your client, The Cherry Tree Ltd., you requested a tariff classification ruling.

The submitted sample, designated as "PitPac", consists of a 9" x 9" cloth bag, constructed from 100% cotton fabric, into which are sewn washed-and-dried cherry pits. According to the descriptive literature supplied, the subject product has many health care applications, and, upon heating in a microwave oven, standard oven or double boiler, or placing in a freezer (for use as a cold compress), can be used to reduce muscle tension, aches and pains, ease arthritic conditions, migraine headaches, toothaches, etc. The descriptive literature also indicates that this product comes in a 4.5" x 18" size.

The applicable subheading for the subject product will be 3005.90.5090, Harmonized Tariff Schedule of the United States (HTS), which provides for: "Wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), * * * put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes: Other: Other: Other." The general rate of duty will be free.

This merchandise may be subject to the regulations of the Food and Drug Administration. You may contact them at 5600 Fishers Lane, Rockville, Maryland 20857, telephone number (301) 443–6553.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist C. Reilly at 212–466–5770.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, February 15, 1995.

CLA–2–39:S:N:N6:221 806312
Category: Classification
Tariff No. 3926.90.9890 and 3005.90.5090

MR. DALE MARTEL
TREKWARE DEVELOPMENTS LTD.
1613 Passageview Drive
Campbell River, BC
Canada V9W 6L2

Re: The tariff classification and status under the North American Free Trade Agreement (NAFTA), of "Cool Ties," "Cool Bands" and "Cool Paks" from Canada; Article 509.

DEAR MR. MARTEL:

In your letter dated January 9, 1995, you requested a ruling on the classification and status under the NAFTA of cooling articles from Canada.

The "Cool Tie" is a scarf-like item measuring approximately 38 inches in length and 2 inches in width, designed to be tied around the neck. The "Cool Band" is a headband measuring approximately 22 inches in circumference by 2¾ inches in width. It incorporates an elastic panel and is designed to be worn across the forehead. Both of these items are made of woven fabric and contain crystals of polyacrylamide. When the articles are soaked in water, the crystals absorb the liquid, expanding many times their original size. When the tie and band are placed on the skin, the coolness of the absorbed water and the action of evaporation of moisture from the skin cause a cooling effect.

The "Cool Paks" are rectangular pads containing the polyacrylamide crystals between two layers of woven fabric. The larger pad measures approximately 10¾ inches by 8½ inches. The smaller measures approximately 9½ inches by 4¼ inches. They are designed to be used as compresses to relieve aches and pains by cooling the affected area. The compresses may also be warmed in a microwave oven and used to provide a heat treatment to the area.

The applicable tariff provision for the "Cool Paks" will be 3005.90.5090, Harmonized Tariff Schedule of the United States (HTSUSA), which provides for wadding, gauze, bandages and similar articles * * * put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes, other. This provision is free of duty.

The applicable tariff provision for the "Cool Ties" and "Cool Bands" will be 3926.90.9890, HTSUSA, which provides for other articles of plastics, other. The general rate of duty will be 5.3 percent ad valorem.

You have stated that the polymer crystals are purchased from a supplier in the United States and the cloth material is purchased from suppliers in both Canada and the United States. However, you have not indicated whether these components originate in the United States and Canada. If the materials originate in the United States and Canada, then the "Cool Ties" and "Cool Bands," being made entirely in the territory of Canada using materials which themselves were originating, will satisfy the requirements of HTSUSA General Note 12(b)(iii). The merchandise will therefore be entitled to a 1.5 percent ad valorem rate of duty under the NAFTA upon compliance with all applicable laws, regulations, and agreements.

If the goods which you purchase from suppliers in the United States and Canada originate in countries other than the United States, Canada and Mexico, then the finished articles may still be eligible for reduced duty under NAFTA since each of the non-originating materials used to make the "Cool Ties" and "Cool Bands" has satisfied the changes in tariff classification required under the HTSUSA General Note 12(t)/39.10. In this case, the "Cool Ties" and "Cool Bands" will also be subject to a Regional Value Content (RVC) requirement of 60 percent under the Transaction Value Method or 50 percent under the Net Cost Method as required under the rule applicable to the ties and bands. Assuming the goods are eligible for preferential treatment under the NAFTA, the merchandise will be entitled to a 1.5 percent ad valorem rate of duty under the NAFTA upon compliance with all applicable laws, regulations, and agreements.

If the materials used to make the ties and bands are from a non-originating country and you desire a ruling regarding the Regional Value Content of your goods and their eligibility for NAFTA preferential treatment, please send the information noted in Section 181.93(b) of the Customs Regulations (19 CFR 181.93(b)) to the Director, Commercial Rulings Division,Headquarters, U.S. Customs Service, 1301 Constitution Ave. N.W., Franklin Court, Washington, D.C. 20229, along with a copy of this letter. This information should include a breakdown showing the country of origin and cost for each material and showing the country of processing and cost for each of the manufacturing steps.

This ruling is being issued under the provisions of Part 181 of the Customs Regulations (19 C.F.R. 181).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

This ruling letter is binding only as to the party to whom it is issued and may be relied on only by that party.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
New York, NY, August 29, 1995.

CLA–2–30:S:N:N7:238 813748
Category: Classification
Tariff No. 3005.90.5090

MR. ROBERT F. DOMEY
FRITZ COMPANIES, INC.
100 Walnut Street
P.O. Box 2874
Champlain, NY 12919–2874

Re: The tariff classification of Magic Bag® from Canada.

DEAR MR. DOMEY:

In your letter dated August 14, 1995, on behalf of your client, Creations Magiques C.M. Inc., you requested a tariff classification ruling.

The submitted samples, one square-shaped and the other rectangle-shaped, consist of bag or sack-like devices which are used to transfer stored heat (after heating in a microwave oven) or apply cold (after placing in a freezer) onto a body part or limb for about half an hour. Both samples are designated by the trade name Magic Bag®. Each "bag" consists of a shell or envelope which is constructed from 100% cotton fabric, and which, in turn, is filled with a load of cereal (oat) grains. The product is indicated for use to reduce swelling, and to relieve aches and pains, among other things. As submitted, each sample is put up packed for retail sale.

The applicable subheading for Magic Bag® will be 3005.90.5090, Harmonized Tariff Schedule of the United States (HTS), which provides for: "Wadding, gauze, bandages and similar articles * * * put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes: Other: Other: Other." The rate of duty will be free.

This merchandise may be subject to the regulations of the Food and Drug Administration. You may contact them at 5600 Fishers Lane, Rockville, Maryland 20857, telephone number (301) 443–6553.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 961089 MGM
Category: Classification
Tariff No. 1212.99.00

MR. JOHN SVEUM
TOWER GROUP INTERNATIONAL, INC.
P.O. Box 269
Sweetgrass, MT 59484

Re: "PitPacs" Heating and Cooling Pads; Revocation of NY A83830.

DEAR MR. SVEUM:

This office has determined that New York Ruling Letter (NY) A83830, issued to you on May 31, 1996, in response to your letter of May 13, 1996, on behalf of The Cherry Tree Ltd., requesting a ruling regarding the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of "PitPacs" heating and cooling pads is in error. Therefore, this ruling revokes NY A83830 and sets forth the correct classification of "PitPacs" heating and cooling pads.

Facts:

The "PitPacs" heating and cooling pads consist of cherry pits, which have been washed and dried, and encased in a cotton bag. The bag may be 9″ x 9″, or 4.5″ x 18″. The descriptive literature which accompanies the product indicates that it may be heated in a microwave oven, standard oven, or double boiler, or cooled in a freezer. In its heated or cooled state, it is applied to the body to reduce tension, aches, and pains.

Issue:

Whether "PitPacs" heating and cooling pads should be classified in heading 3005, HTSUS, as wadding, gauze, bandages and similar articles; heading 1212, HTSUS, as fruit stones used primarily for human consumption; or one of the headings of chapter 52, HTSUS, as fabric of cotton?

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See,* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

In NY A83830, dated May 31, 1996, this article was classified in heading 3005, HTSUS. This heading provides as follows:

> 3005 Wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes.

Under the rule of *ejusdem generis*, the phrase "similar articles" is limited to goods which "possess the essential characteristics or purposes that unite the articles enumerated *eo nomine*." *Totes, Inc. v. U.S.*, 69 F.3d 495, 498 (Fed. Cir. 1995) (citing *Sports Graphics, Inc. v.*

United States, 24 F.3d 1390 (Fed. Cir. 1994)). The characteristic which unites the exemplars of this heading is their direct application to an ailing portion of the body. Furthermore, this heading is limited to items which are for "medical, surgical, dental or veterinary purposes." While the instant product does purport to reduce tension, aches, and pains, the "PitPacs" heating and cooling comfort pad is more in the nature of a general tonic rather than an item with a definable medical purpose. Thus it is not properly classified in heading 3005, HTSUS.

Neither does any other heading of the nomenclature describe the "PitPacs" heating and cooling pad. Where goods cannot be classified according to GRI 1, the remaining GRIs are applied in order. GRI 2 (b) states that "any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances * * * The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3." GRI 3(b) states that goods which are *prima facie* classifiable under two or more headings and consist of different materials or are made up of different components shall be classified as if they consisted of the material or component which gives them their essential character. Thus, the "PitPacs" heating and cooling pad is classified in either heading 1212, HTSUS, as fruit stones of a kind used primarily for human consumption, or one of the headings of chapter 52, HTSUS, as fabric of cotton, according to which component provides the essential character.

Factors which determine essential character may include bulk, quantity, weight, value, or the role of a constituent material in relation to the use of the goods. Explanatory Note VIII to GRI 3. Here, the cherry pits provide the greater part of the item's bulk and weight. In addition, the cherry pits are not highly conductive of temperature, thus they retain the heat or cold for a period of time after removal from the heating source or freezer. Thus, the essential character of the "PitPacs" heating and cooling pad is found in the cherry pits and it is classified in heading 1212, HTSUS.

Within heading 1212, HTSUS, none of the *eo nomine* provisions include cherry pits, thus this merchandise falls in the residual provision.

Holding:

The "PitPacs" heating and cooling pad is classified in subheading 1212.99.00, HTSUS, which provides for fruit stones of a kind used primarily for human consumption, not elsewhere specified or included, other, other.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 962352 MGM
Category: Classification
Tariff No. 3926.90.98

MR. DALE MARTEL
TREKWARE DEVELOPMENTS LTD.
1613 Passageview Dr,
Campbell River, BC
Canada V9W6L2

Re: "Cool Ties," "Cool Bands," and "Cool Paks" cooling pads; Modification of NY 806312.

DEAR MR. MARTEL:

This office has determined that New York Ruling Letter (NY) 806312, issued to you on February 16, 1995, in response to your letter of January 9, 1995, requesting a ruling regarding the classification, under the Harmonized Tariff Schedule of the United States

(HTSUS), of "Cool Ties," "Cool Bands," and "Cool Paks" is partially in error. That portion of NY 806312 pertaining to the classification of "Cool Paks" no longer reflects the position of the Customs Service. Therefore, this ruling modifies NY 806312 and sets forth the correct classification of "Cool Paks."

Facts:

The "Cool Paks" are rectangular pads. The larger pad measures approximately 10.75 inches by 8.5 inches, while the smaller pad measures approximately 9.5 by 4.25 inches. They are designed to be used as compresses on any part of the body. These items are made of polyacrylamide crystals enclosed within woven fabric. When the articles are soaked in water, the crystals absorb the liquid, expanding to many times their original size. When placed against the skin, the coolness of the absorbed water and the action of evaporation of moisture from the skin bring about a cooling effect. The "Cool Paks" may also be warmed in a microwave oven and used to provide heat treatment to an area of the body.

Issue:

Whether "Cool Paks" should be classified in heading 3005, HTSUS, as wadding, gauze, bandages and similar articles; heading 3926, HTSUS, as other articles of plastics; or one of the headings of Section XI, HTSUS, as textiles?

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See*, T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

In NY 806312, dated February 16, 1996, the "Cool Pak" was classified in heading 3005, HTSUS. This heading provides as follows:

> 3005 Wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes.

Under the rule of *ejusdem generis*, the phrase "similar articles" is limited to goods which "possess the essential characteristics or purposes that unite the articles enumerated *eo nomine.*" *Totes, Inc. v. U.S.*, 69 F.3d 495, 498 (Fed. Cir. 1995) (citing *Sports Graphics, Inc. v. United States*, 24 F.3d 1390 (Fed. Cir. 1994)). The characteristic which unites the exemplars of this heading is their direct application to an ailing portion of the body. Furthermore, this heading is limited to items which are for "medical, surgical, dental or veterinary purposes." The cooling effect provided by these products may increase comfort, but does not rise to the level of a medical treatment. Similarly, that the "Cool Pak" may be used to provide heat treatment to an area of the body is not sufficient to qualify it as a medical treatment. Thus it is not properly classified in heading 3005, HTSUS.

Neither does any other heading of the nomenclature describe the "Cool Paks" cooling devices. Where goods cannot be classified according to GRI 1, the remaining GRIs are applied in order. GRI 2 (b) states that "any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances * * * The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3." GRI 3(b) states that goods which are *prima facie* classifiable under two or more headings and consist of different materials or are made up of different components shall be classified as if they consisted of the material or component which gives them their essential character.

Thus, the "Cool Paks" cooling devices are classified in either heading 3926, HTSUS, as other articles of plastics, or one of the headings of Section XI, HTSUS, as textiles.

Factors which determine essential character may include bulk, quantity, weight, value, or the role of a constituent material in relation to the use of the goods. Explanatory Note VIII to GRI 3. Here, the polyacrylamide crystals provide the greater part of the item's bulk and weight. In addition, the polyacrylamide crystals retain and then release moisture, thereby enabling the cooling effect of these products. Thus, the essential character of the "Cool Paks" cooling devices is found in the polyacrylamide crystals and it is classified in heading 3926, HTSUS.

Within heading 3926, HTSUS, none of the *eo nomine* provisions include polyacrylamide crystals, thus this merchandise falls in the residual provision.

Holding:

The "Cool Paks" cooling devices are classified in subheading 3926.90.98, HTSUS, which provides for other articles of plastics, other, other. General Note 12, HTSUS, continues to govern the dutiable treatment of this merchandise under the North American Free Trade Agreement.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT F]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 962353 MGM
Category: Classification
Tariff No. 1004.00.00

MR. ROBERT F. DOMEY
FRITZ COMPANIES, INC.
100 Walnut Street
P.O. Box 2874
Champlain, NY 12919–2874

Re: The "Magic Bag" heating and cooling pad; Revocation of NY 813748.

DEAR MR. DOMEY:

This office has determined that New York Ruling Letter (NY) 813748, issued to you on August 29, 1995, in response to your letter of August 14, 1995, on behalf of Creations Magiques C.M. Inc., requesting a ruling regarding the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of the "Magic Bag" is in error. Therefore, this ruling revokes NY 813748 and sets forth the correct classification of the "Magic Bag."

Facts:

The "Magic Bag" is a square or rectangle shaped bag which consists of cereal (oat) grains enclosed within 100% cotton fabric. The bags are designed to be heated in a microwave oven or cooled in a freezer, then applied to the body so as to heat or cool an area of the body. The product is indicated for use on the body in reduction of swelling and relief of aches and pains.

Issue:

Whether "Magic Bags" heating and cooling pads should be classified in heading 3005, HTSUS, as wadding, gauze, bandages and similar articles; heading 1004, HTSUS, as oats; or one of the headings of chapter 52, HTSUS, as woven fabric of cotton?

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation

(GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See*, T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

In NY 813748, dated August 29, 1995, the "Magic Bag" was classified in heading 3005, HTSUS. This heading provides as follows:

> 3005 Wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes.

Under the rule of *ejusdem generis*, the phrase "similar articles" is limited to goods which "possess the essential characteristics or purposes that unite the articles enumerated *eo nomine*." *Totes, Inc. v. U.S.*, 69 F.3d 495, 498 (Fed. Cir. 1995) (citing *Sports Graphics, Inc. v. United States*, 24 F.3d 1390 (Fed. Cir. 1994)). The characteristic which unites the exemplars of this heading is their direct application to an ailing portion of the body. Furthermore, this heading is limited to items which are for "medical, surgical, dental or veterinary purposes." The claimed reduction of swelling and relief of aches and pains provided by this product does not rise to the level of a medical treatment. Thus it is not properly classified in heading 3005, HTSUS.

Neither does any other heading of the nomenclature describe the "Magic Bag," heating and cooling pad. Where goods cannot be classified according to GRI 1, the remaining GRIs are applied in order. GRI 2(b) states that "any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances * * * The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3." GRI 3(b) states that goods which are *prima facie* classifiable under two or more headings and consist of different materials or are made up of different components shall be classified as if they consisted of the material or component which gives them their essential character. Thus, the "Magic Bag," heating and cooling pad is classified in either heading 1004, HTSUS, as oats, or one of the headings of Chapter 52, HTSUS, as woven fabric of cotton.

Factors which determine essential character may include bulk, quantity, weight, value, or the role of a constituent material in relation to the use of the goods. Explanatory Note VIII to GRI 3. Here, the cereal grain provides the greater part of the item's bulk and weight. In addition, it is the grain which primarily retains the heat or cold for a period of time after removal from the heating source or freezer. Thus, the essential character of the "Magic Bag" cooling and heating pad is found in the cereal oat grain and it is classified in heading 1004, HTSUS.

Holding:

The "Magic Bag" cooling and heating pad is classified in subheading 1004.00.00, HTSUS, which provides for oats.

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION OF A RULING LETTER PERTAINING TO THE CLASSIFICATION OF A BREAST PUMP HOUSING

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of a tariff classification ruling letter

SUMMARY: Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of a breast pump housing.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after February 3, 1999.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Hollaway, Commercial Rulings Division (202) 927–2379.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking District Decision (DD) 813534, dated August 29, 1995, with respect to the classification of a breast pump housing. In DD 813534, the housing was classified under subheading 4202.92.0040 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides, in part, for trunks, suitcases, briefcases, camera cases, handbags, jewelry boxes and similar containers. On October 7, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 40, proposing to revoke DD 813534 and requesting comments. No comments were received. HQ 958471 revoking DD 813534 is the "Attachment" to this document.

Publication of ruling or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: November 17, 1998.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, November 17, 1998.

CLA–2 RR:CR:TE 958471 RH
Category: Classification
Tariff No. 8413.91.9080

MR. GORDON GILES
DIRECTOR OF PURCHASING
MEDELA, INC.
P.O. Box 660
McHenry, IL 60051–0660

Re: Request for Reconsideration of DD 813534; Breast Pump Housing; Heading 4202; Heading 8413; Heading 9018.

DEAR MR. GILES:

This is in reply to your letter of September 26, 1995, asking us to review District Decision (DD) 813534, dated August 29, 1995, concerning the classification of a housing for a breast pump.

You met with members of my staff on February 5, 1996, and May 27, 1998, to discuss the issues in this case and to demonstrate the function of the breast pump housing. We apologize for the delay in responding to your request.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of DD 813534 was published on October 7, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 40.

Facts:

The article under consideration is a housing for a portable breast pump. It is constructed of PVC sponge material and is approximately 13 inches by 13 inches by 5 inches. The housing is manufactured in Hong Kong. The remaining components (breast pump, motor, etc.) will be assembled into the bag in the United States. The bag is designed specifically as a housing or casing for an electrical breast pump motor and related accessories. The housing has an opening and cutouts in the front to allow for the front plate of the pump. Mounted to the housing is a pump front plate with hose nipples to which the hoses and breast suction cups are attached. These components are inconspicuously concealed within the housing by a zippered closure. The pump will be glued into the housing. The bag has a shoulder strap for easy carrying and storage compartments for spare bottles, suction cups and hoses. It also has insulated storage for milk and ice blocks. The importer states that Medela cannot sell the pump if it is not contained within the housing because the exposed electrical components would be hazardous.

In DD 813534, Customs classified the housing under subheading 4202.92.9040 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides, in part, for trunks, suitcases, briefcases, camera cases, handbags, tool bags, jewelry boxes and similar containers with outer surface of sheeting of plastic.

You contend that the breast pump housing should be classified under Chapter 90, HTSUSA, as an accessory to a medical device, or under Chapter 84, HTSUSA, as an accessory to a pump.

Issue:

Is the breast pump housing classifiable under heading 4202, HTSUSA, as a "similar container" with outer surface of sheeting of plastic; under heading 9018, HTSUSA, as an accessory to a medical device; or under heading 8413, HTSUSA, as an accessory to a pump?

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

The first heading we consider is 9018 which encompasses "Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof." The EN to heading 9018 state that:

> This heading covers a very wide range of instruments and appliances which, in the vast majority of cases, are used only in professional practice (e.g., by doctors, surgeons, dentists, veterinary surgeons, midwives), either to make a diagnosis, to prevent or treat an illness or to operate, etc.

The EN also list numerous exemplars of the type of medical instruments and appliances which are classifiable under heading 9018, HTSUSA, including needles, surgical knives, catheters, suction tubes, syringes, intratracheal tubes, intubation tubes, blood transfusion apparatus. In this case, the breast pump housing is designed and intended for use by nursing mothers in the home, at work or on travel. Thus, we do not consider it to be medical instruments and appliances under heading 9018.

Another heading under consideration is 4202. In DD 813534, Customs classified the housing in question under subheading 4202.92.9040, HTSUSA, which provides, in part, for trunks, suitcases, briefcases, camera cases, handbags, tool bags, jewelry boxes and similar containers with outer surface of sheeting of plastic. You assert that the housing is not like any item in heading 4202, and that it cannot be used as a "plain bag" or "case" but only as a part of the breast pump. You further state that upon assembly in the United States, the internal motor, the front plate and other components will be permanently assembled within the housing with strips of VELCRO reinforced with silicone glue to assure that the motor is not easily removable. Moreover, you demonstrated during the meeting that the motor must be permanently assembled within the housing as a protection against electrical shock in accordance with Underwriters Laboratories regulations.

Before we determine if the housing was correctly classified in heading 4202 in DD 8 13534, we will explore its classification as a part of a pump in heading 8413. That heading provides for "Pumps for liquids, whether or not fitted with a measuring device; liquid elevators; part thereof." It is Customs position that articles which are identifiable as parts of machines or apparatus of Chapters 84 and 85 are classifiable in accordance with Section XVI, Note 2, HTSUSA. Specifically, Note 2(b) covers parts that are provided for in the same heading as the machine or apparatus with which they are solely or principally used. However, for Note 2(b) to be applicable, the status of an article as a part must first be established.

In New York Ruling Letter (NY) 818324, dated February 15, 1996, Customs classified one of your company's casings and/or housings used to house a mini motor breast pump under subheading 8413.91.9080, as other parts of other liquid pumps. In that case, the housing had a small box-like shape with a zipper-closed upper opening and cutouts in the front to allow for the front plate of the pump. It was designed to internally contain a small, battery powered air vacuum pump as well as the battery holder. Mounted on the outside of the housing was a pump front plate which contained the on/off switch and hose nipples to which the air hoses and breast suction cup were attached. The components in that case were not removable. That housing was only large enough to hold the pump and had no additional compartments. You advised us that the pump in question operates similarly to the mini breast pump in NY 818324, which Customs classified under heading 8413.

Originally, in order for an item to be classified as a "part" of an article, that item must have been "something necessary to the completion of that article * * * [and] an integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article." *United States v. Willoughby Camera Stores. Inc.*, 21 CCPA 322, 324, T.D. 46, 51 (1933), cert. denied, 292 U.S. 640 (1934); *United States v. Antonio Pompeo*, 43 CCPA 9,11, C.A.D. 602 (1955). This rule has been somewhat modified so that a device may be considered a 'part' of an article even though the device is not necessary to the operation of the article, provided that once the device is installed the article cannot function properly without it. *Clipper Belt Lacer Co.. Inc. v. United States*, 14 CIT 146, 738 F. Supp 528 (1990). In order to meet this standard, the device must be dedicated for use with the article. See *Beacon Cycle & Supply Co., Inc. v. United States*, 81 Cust. Ct. 46, 50–51, C.D. 4764, 458 F. Supp. 813, 816–17.

The housing in question provides an inconspicuous way to carry a breast pump for the active mom who must pump at work or other places outside of the home. It is imported by Medela only for assembly with the pump. It is never sold separately and is produced exclusively for the pump. Prior to importation, the housing is precut for assembly of the pump components in the same manner as the housing in NY 818324. The pump is placed and glued into the housing. Medela cannot sell the pump without the housing under Underwriter Laboratory regulations because the housing has to fully encompass the electrical components.

Based on the foregoing we find that the breast pump housing is an integral, constituent, or component part of the pump. The fact that the housing has a carrying strap and additional accessories such as storage compartments for spare bottles, suction cups, hoses, milk and ice blocks does not preclude it from classification as a "part" of the breast pump under heading 8413.

Holding:

The breast pump housing under consideration is classifiable under subheading 8413.91.9080, HTSUSA, which provides for "Pumps for liquids, whether or not fitted with a measuring device; liquid elevators; part thereof: Parts: Of pumps: Other: Other." It is dutiable at the general column one rate at 0.6 percent ad valorem.

DD 813534 dated August 29, 1995, is hereby revoked. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF THE IRON ALLOY POWDER "WELLMAX NS–3"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of the iron alloy powder "Wellmax NS–3" under the Harmonized Tariff Schedule of the United States (HTSUS). Notice of the proposed revocation was published on October 7, 1998, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after February 3, 1999.

FOR FURTHER INFORMATION CONTACT: Michael McManus, General Classification Branch, Office of Regulations and Rulings (202) 927–2326.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On October 7, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 40, proposing to revoke New York Ruling Letter (NY) A88776, dated November 18, 1996, which classified "Wellmax NS–3" iron alloy powder in subheading 3824.90.90, HTSUS, the residual provision for "Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified or included." No comments were received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking NY A88776 to reflect the proper classification of the iron alloy powder "Wellmax NS–3" in subheading 7205.21.00, HTSUS, as a powder of alloy steel. HQ 961028, revoking NY A88776, is set forth as the Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: November 13, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, November 13, 1998.

CLA–2 RR:CR:GC 961028 MGM
Category: Classification
Tariff No. 7205.21.00

MR. ROBERT O. KECHIAN
NNR AIRCARGO SERVICE (USA) INC.
Hook Creek Blvd. & 145th Ave.
Unit C–1A
Valley Stream, NY 11581

Re: Wellmax NS–3; Revocation of NY A88776.

DEAR SIR:

This is in response to your letter of February 10, 1997, on behalf of Nissho Iwai American Corporation, requesting reconsideration of New York Ruling Letter (NY) A88776, issued

to you on November 18, 1996, concerning the classification of Wellmax NS–3 powder under the Harmonized Tariff Schedule of the United States (HTSUS). We have determined that the ruling is in error. Therefore, this ruling revokes NY A88776 and sets forth the correct clasification of Wellmax NS–3 powder. In preparing this decision, consideration was given to correspondence submitted on August 17, 1998, and September 9, 1998.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY A88776 was published on October 7, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 40. No comments were received in response to that notice.

Facts:

The product in question is Wellmax NS–3 powder, which is a combination of magnaquench crushed ribbon (isotropic powder) (MQ), composed of neodymium, iron, boron, and other minor constituents, and polyphenylene sulfide. The starting materials to make the MQ powder are neodymium oxide and fluoride which are processed to yield a neodymium-iron eutectic material. This material is then combined with ferroboron, cobalt, and other elements in an inert atmosphere-controlled alloy furnace. The alloy is melted and ejected onto a chilled rotating wheel in a jet cast process causing a rapid solidification process which produces flakes of neodymium-iron-boron (NdFeB). These flakes are crushed to form MQ powder. This MQ powder is then combined with polyphenylene sulfide at a ratio of 85%:15% to make Wellmax NS–3. This product consists of 22–28% neodymium, 0.8% boron, >35% iron, <18% cobalt, .09% carbon, and 10–15% polyphenylene sulfide. It is used to form bonded magnets with an injection molding machine.

Customs Laboratory Report 2–97–21735–001, dated July 2, 1997, states that Wellmax NS–3 powder is "a mixture of metal alloy powder and over 5% aromatic resin."

In NY A88776, Customs ruled that Wellmax NS–3 was classified in subheading 3824.90.9050, HTSUS, the residual provision for "Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified or included."

Issue:

Whether Wellmax NS–3 is classified in subheading, 3824.90.9050, HTSUS.

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See*, T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

In NY A88776, "Wellmax NS–3" was classified in subheading 3824.90.90, HTSUS, as a chemical product or preparation of the chemical or allied industries, not elsewhere specified or included. This classification is appropriate only where the merchandise does not fall under any other tariff heading. As this product is included within subheading 7205.21.00, HTSUS, it is excluded from subheading 3824.90.90, HTSUS.

Note 5 to Section XV, HTSUS, governs the classification of alloys, however, ferroalloys are excepted from Note 5. Ferroalloys are "commonly used as an additive in the manufacture of other alloys or as deoxidants, desulphurising agents or for similar uses in ferrous metallurgy." Note 1(c), Chapter 72, HTSUS. Customs Laboratory Report 2–97–21735–001, dated July 2, 1997, states that "the importer claims the product is to be

used 'as is' with no further additives to manufacture to magnets by injection molding." In addition, an advertising brochure describes Wellmax NS–3 as a product that enables flexibly designed magnetic circuits and is utilized in a wide range of applications such as small size motors for various purposes. Since this mixture of metal alloy powder and over 5% aromatic resin is not commonly used as an additive in the manufacture of other alloys or as otherwise set forth in Note 1(c), Chapter 72, HTSUS, it is not a ferroalloy for tariff classification purposes. This is consistent with HQ 557528, dated December 17, 1993. It remains, however, an "alloy" for purposes of tariff classification as set forth in Note 5, Section XV, HTSUS.

Note 5(b) to Section XV states that "An alloy composed of base metals of this section and of elements not falling within this section is to be treated as an alloy of base metals of this section if the total weight of such metals equals or exceeds the total weight of the other elements present." The term "base metals" includes steel, iron, and cobalt. Note 3, Section XV. Here, the combined weight of iron and cobalt constitutes greater than 50 percent of the alloy and necessarily exceeds that of component compounds other than base metals. Therefore, Wellmax NS–3 is an alloy of base metals of Section XV of the HTSUS.

An alloy of base metals of Section XV is to be classified as an alloy of the metal which predominates by weight over each of the other metals. Note 5(a), Section XV. Steels are defined as ferrous materials which "are usefully malleable and which contain by weight 2 percent or less of carbon." Note 1(d), Chapter 72. Steel predominates by weight over the other base metals, thus this product is a steel alloy. "Other alloy steel" is a steel which is not stainless steel (1.2 percent or less of carbon and 10.5 percent or more of chromium) and which contains a specific quantum of any of several other elements. Note 1(f), Chapter 72. This merchandise is not stainless steel as the chromium content is less than 10.5 percent, however it does contain sufficient boron and cobalt to be considered an "other alloy steel."

Any reference to a base metal includes a reference to alloys which, by virtue of Note 5, Section XV, are to be classified as alloys of that metal. Note 6, Section XV. Thus, the term "steel," in the HTSUS, includes Wellmax NS–3.

Heading 7205, HTSUS, provides as follows:

7205	Granules and powders, of pig iron, spiegeleisen, iron or steel:
7205.10.0000	Granules
	Powders:
7205.21.0000	Of alloy steel
7205.29.0000	Other.

A powder is a product of which 90 % or more by weight passes through a sieve having a mesh aperture of 1 mm (.001 meters). Note 8, Section XV. The advertising brochure for this product states that the mean particle size is 15–30 μm (.000015–.000030 meters). Since the aperture through which a particle must pass to be consisdered a powder is much larger than this product, it can be assumed that it would pass through unhindered and is therefore considered a powder rather than a granule.

Holding:

Wellmax NS–3 powder is classified in subheading 7205.21.0000, HTSUS.

NY A88776 is revoked. In accordance with 19 U.S.C. §1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO THE CLASSIFICATION OF ORNAMENTAL TRIMMINGS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of the modification of ruling letter concerning the tariff classification of ornamental trimmings consisting of narrow woven fabrics.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUSA) of ornamental trimmings consisting of narrow woven fabrics.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after February 3, 1999.

FOR FURTHER INFORMATION: Phil Robins, Textile Branch, Office of Regulations and Rulings (202–927–1031).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of narrow woven fabrics under the Harmonized Tariff Schedule of the United States (HTSUSA).

On October 14, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 41, proposing to modify New York Ruling Letter (NY) C83218, dated January 13, 1998, which incorrectly classified three ornamental narrow woven fabric ribbons under subheading 5808.90, HTSUSA, which provides for ornamental trimmings in the piece. Comments were invited on the correctness of the change. No comments were received.

Customs Headquarters Ruling Letter (HQ) 961986 modifying NY C83218 is set forth as the "Attachment" to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: November 16, 1998.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, November 16, 1998.

CLA–2 RR:CR:TE 961986 dnm
Category: Classification
Tariff No. 5806.32.1090,
5806.39.3020 and 5808.90.0010

MS. SHEILA ANDREWS
DILLARD DEPARTMENT STORES
11701 Otter Creek Road South
Mabelvale, AR 72103

Re: Modification of NY C83218 Concerning Three Styles of Ornamental Ribbons.

DEAR MS. ANDREWS:

This is in response to your letter, dated June 9, 1998, requesting reconsideration of New York Ruling Letter (NY) C83218, dated January 13, 1998, regarding the classification of ornamental trimmings and a warp knit open mesh fabric under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Your request for reconsideration dealt only with the three narrow woven fabric ribbons identified as styles 827TRB32TN, 827TRB27TN, and 827TRB62TF and not the open mesh knit fabric identified as style 827TRB79TF.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of NY C83218 was published on October 14, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 41.

Facts:

All styles under review are woven ribbons. Each is approximately 2½ inches wide, 30 feet in length, and has hemmed lengthwise edges with a wire inserted in each hem. The ends are cut at right angles to the side edges. The three styles are made from different materials: style 827TRB32TN is 55 percent metallic, 35 percent nylon, and 10 percent polyester; style 827TRB27TN is 70 percent metallic and 30 percent nylon; and style 827TRB62TF is 75 percent polyester and 25 percent metallic.

The Harmonized Tariff Schedule of the United States Annotated (HTSUSA) provisions under consideration are as follows:

5806	Narrow woven fabrics, other than goods of heading 5807; narrow fabrics consisting of warp without weft assembled by means of an adhesive
* * * * * * *	
5806.32	Of man-made fibers:
5806.32.10	Ribbons
5806.32.1010	Suitable for the manufacture of typewriter or similar ribbons of heading 9612
5806.32.1090	Other
* * * * * * *	
5806.39	Of other textile materials:
5806.39.1000	Of wool or fine animal hair
5806.39.2000	Of vegetable fibers except cotton
5806.39.30	Other
5806.39.3010	Containing 85 percent or more by weight of silk or silk waste
	Other:
5806.39.3020	Of metalized yarn
* * * * * * *	
5808	Braids in the piece; ornamental trimmings in the piece, without embroidery, other than knitted or crocheted; tassels, pompons and similar articles:
	Braids in the piece:

* * * * * * *

5808.90.00	Other
5808.90.0010	Of cotton; of man-made fibers
5808.90.0020	Other:

Issue:

Whether the ornamental trimmings identified as styles 827TRB32TN, 827TRB27TN, and 827TRB62TF are classifiable under heading 5808 or 5806 HTSUSA?

Law and Analysis:

Classification of merchandise under the HTSUSA is governed by the General Rules of Interpretation (GRIs). GRI 1 requires that classification be determined according to the terms of the headings and any relative section or chapter notes. If goods cannot be classified pursuant to GRI 1, then classification shall be according to the remaining GRIs in the order in which they appear. The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System represent the official interpretation of the tariff at the international level. They facilitate classification under the HTSUS by offering guidance concerning the scope and meaning of the GRIs, notes, and headings.

Subheading Note 2, Section XI, HTSUSA, provides, in pertinent part:

> 2.(A) Products of chapters 56 to 63 containing two or more textile materials are to be regarded as consisting wholly of that textile material which would be selected under note 2 to this section for the classification of a product of chapters 50 to 55 consisting of the same textile materials.
>
> (B) For the purposes of this rule:
>
> (a) Where appropriate, only the part which determines the classification under general interpretative rule 3 shall be taken into account.

Section XI (wherein chapter 58 is located), note 2(A), HTSUSA, provides:

> Goods classifiable in chapters 50 to 55 or in heading 5809 or 5902 and of a mixture of two or more textile materials are to be classified as if consisting wholly of that one textile material which predominates by weight over each other single textile material.

Heading 5806, HTSUSA, provides for "narrow woven fabrics." The meaning of "narrow woven fabrics" is found in note 5(a) to chapter 58, HTSUSA, which provides the following definition: "***[w]oven fabrics of a width not exceeding 30 cm***, whether woven as such or cut from wider pieces, provided with selvages (woven, gummed or otherwise made) on both edges." (Emphasis added). ENs (A)(1) and (A)(2) for 5806, HTSUSA, state that the heading includes:

> (1) Warp and weft fabrics in strips of a width not exceeding 30 cm, ***"provided with selvedges (flat or tubular) on both edges"***. These articles are produced on special ribbon looms several ribbons often being produced simultaneously; in some cases the ribbons may be woven with wavy edges on one or both sides.
>
> (2) Strips of a width not exceeding 30 cm, cut (or slit) from wider pieces of warp and weft fabric (whether cut (or slit) longitudinally or on the cross) and provided with ***false selvedges on both edges***, or a normal woven selvedge on one edge and a false selvedge on the other. False selvedges are designed to prevent unravelling [sic] of a piece of cut (or slit) fabric and may, for example, consist of a row of gauze stitches woven into the wider fabric before cutting (or slitting), ***of a simple hem***, or they may be produced by gumming the edges of strips, or by fusing the edges in the case of certain ribbons of man-made fibres. (Emphasis added).

The classification of ribbons with wires inserted in hemmed edges of narrow woven fabrics has been the subject of several prior Customs Rulings. For example, see HQ 960767, dated January 15, 1998; HQ 953062, dated March 8, 1993; and HQ 953833, dated February 6, 1993. In each ruling, the goods were classified under heading 5806.

Accordingly, the goods in question, which are under 30 cm in width and which are hemmed (false selvages), are properly classifiable under heading 5806 as narrow fabrics.

Holding:

The goods which are the subject of this ruling are classifiable under heading 5806, HTSUSA. Style 827TRB62TF, made of 75 percent polyester and 25 percent metallic fibers, is classifiable in subheading 5806.32.1090, HTSUSA, with duty at the rate of 7.8 percent ad valorem. The designated textile and apparel category for that subheading is 229.

Style 827TRB32TN, made of 55 percent metallic, 35 percent nylon, and 10 percent polyester fibers, and style 827TRB27TN made of 70 percent metallic and 30 percent nylon fi-

bers is 5806.39.3020, HTSUSA, with duty at the rate of 1.8 percent ad valorem. The designated textile and apparel category for that subheading is 229.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

NY C83218 dated January 13, 1998, is hereby modified. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF MIXTURES OF AMINO ACIDS USED AS NUTRITIONAL SUPPLEMENTS IN ANIMAL FEED

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of mixtures of amino acids used as nutritional supplements for horses, imported in bulk, under the Harmonized Tariff Schedule of the United States (HTSUS). Notice of the proposed revocation was published on October 7, 1998, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after February 3, 1999.

FOR FURTHER INFORMATION CONTACT: Michael McManus, Office of Regulations and Rulings, General Classification Branch, (202) 927–2326.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On October 7, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 40, proposing to revoke New York Ruling

Letter (NY) 864727, dated July 19, 1991, which classified amino acid mixtures known as "Ta Chuang," "Hsieh," "Feng," "Ta Ch'u," and "Sheng" in subheading 3823.90.5050, HTSUS, the residual provision for chemical products and preparations of the chemical or allied industries. The analogous provision in the 1998 tariff schedule is subheading 3824.90.9050, HTSUS. No comments were received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking NY 864727 to reflect the proper classification of mixtures of amino acids used as nutritional supplements in animal feed in subheading 2309.90.9500, HTSUS, the residual provision for mixed feed ingredients. Headquarters Ruling Letter 962012, revoking NY 864727, is set forth as the Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10 (c)(1)).

Dated: November 13, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, November 13, 1998.

CLA–2 RR:CR:GC 962012 MGM
Category: Classification
Tariff No. 2309.90.9500

MS. LISA A. LOCICERO
HEARTLAND FARMS, INC.
96 Sycamore Gardens
New Windsor, NY 12553

Re: "Ta Chuang," "Hsieh," "Feng," "Ta Ch'u," and "Sheng" Amino Acid Powders; Revocation of NY 864727.

MS. LOCICERO:

This office has determined that New York Ruling Letter (NY) 864727, issued to you on July 19, 1991, in response to your letter of June 27, 1991, requesting a ruling regarding the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of several mixtures of amino acids used as nutritional supplements for horses, is in error. Therefore, this ruling revokes NY 864727 and sets forth the correct classification of mixtures of amino acids used as nutritional supplements for horses.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agree-

ment Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY 864727 was published on October 7, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 40. No comments were received in response to that notice.

Facts:

In NY 864727, Customs ruled that amino acid mixtures known as "Ta Chuang," "Hsieh," "Feng," "Ta Ch'u," and "Sheng" were classified in subheading 3823.90.5050, HTSUS, the residual provision for chemical products and preparations of the chemical or allied industries. The analogous provision in the 1998 tariff schedule is subheading 3824.90.9050, HTSUS.

These mixtures of amino acids are sold for use as nutritional supplements for horses. Amino acids are capable of polymerizing to form long chains known as proteins. Proteins play a wide variety of structural and functional roles in biological systems. They form the primary basis of hair, tendons, muscle, skin, and cartilage. Enzymes (biological catalysts) are proteins. In addition, many hormones, such as insulin and growth hormone, are proteins. *McGraw-Hill Multimedia Encyclopedia of Science & Technology.* The merchandise is imported in bulk form.

Issue:

Whether mixtures of amino acids, imported in bulk form for use as nutritional supplements for horses, are classified in the residual provision for chemical products and preparations of the chemical or allied industries.

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See,* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The following headings are relevant to the classification of this merchandise:

2309	Preparations of a kind used in animal feeding:
2309.10	Dog or cat food, put up for retail sale
2309.90	Other:
2309.90.10	Mixed feeds or mixed feed ingredients
	Other:
	Other:
	Other:
2309.90.95	Other
* * * * * * *	
3824	Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified or included:
3824.90	Other:
	Other:
	Other:
	Other:
3824.90.90	Other:
3824.90.9050	Other:

This matter is governed primarily by GRI 1, in that the choice in classification is between two headings. Heading 3824, HTSUS, encompasses only those chemical products which are "not elsewhere specified or included." Thus, if these amino acid mixtures are included within heading 2309, HTSUS, they will not be classified in heading 3824, HTSUS.

EN 23.09 states that "This heading covers sweetened forage and prepared animal feeding stuffs consisting of a mixture of several nutrients designed: * * * (3) for use in making complete or supplementary feeds." EN 23.09 (II) (C) lists amino acids among "Preparations for use in making the complete feeds or supplementary feeds." Thus, a mixture of amino acids used as a nutritional supplement to the equine diet is classified in this heading. At the six-digit subheading level, this product will be classified in subheading 2309.90, HTSUS, as it is not dog or cat food. Within 2309.90, items are classified as "Mixed feeds or mixed feed ingredients" or "Other." "The term 'mixed feeds and mixed-feed ingredients' in subheading 2309.90.10 embraces products of heading 2309 which are admixtures of grains (or products, including byproducts, obtained in milling grains) with molasses, oilcake, oilcake meal or feedstuffs, and which consist of not less than 6 percent by weight of grain or grain products." Additional U.S. Note 1, Chapter 23. As this merchandise does not contain six percent grain or grain products by weight, it is "other" than "mixed feeds or mixed-feed ingredients." Of the remaining subheadings, the merchandise is best classified in subheading 2309.90.95, HTSUS, the residual provision, as it is not described by any of the more specific provisions.

Holding:

Mixtures of amino acids for use as nutritional supplements for horses, imported in bulk, are classified in subheading 2309.90.95, HTSUS. As this is an "actual use" provision, this classification is satisfied only if use as animal feed is intended at the time of importation, the goods are so used, and proof thereof is furnished within 3 years after the date the goods are entered. *See* Additional U.S. Rules of Interpretation 1(b); 19 CFR 10.133 et seq.

NY 864727 is revoked. In accordance with 19 U.S.C. §1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway

Senior Judges

James L. Watson

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Bernard Newman

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Nicholas Tsoucalas

R. Kenton Musgrave

Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

NOTE: This is to advise that Slip Op. 98–147 is not available for publication at this time due to the confidential nature of the document. A public version of the document will be released and published in the CUSTOMS BULLETIN when available.

(Slip Op. 98–147)

GOSS GRAPHIC SYSTEMS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 96–10–02314

(Dated October 16, 1998)

(Slip Op. 98–148)

GERALD METALS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND MAGNESIUM CORP OF AMERICA, INT'L UNION OF OPERATING ENGINEERS, LOCAL 564, AND UNITED STEEL WORKERS OF AMERICA, LOCAL 8319, DEFENDANT-INTERVENORS

Court No. 95–06–00782

[ITC remand determination affirmed.]

(Decided October 20, 1998)

Holland & Knight LLP (Frederick P. Waite and *Kimberly R. Young)* and *Joseph Brooks* for Plaintiff.

Lyn M. Schlitt General Counsel; *James A. Toupin*, Deputy General Counsel; *Andrea C. Casson*, *Michael Diehl*, and *Willis S. Martyn III*, Office of the General Counsel, U.S. International Trade Commission, for Defendant.

Baker & Botts, L.L.P. (William D. Kramer and *Clifford E. Stevens, Jr.)* for Defendant-Intervenor.

OPINION

POGUE, *Judge:* On April 28, 1998, the Court remanded this matter to the International Trade Commission ("Commission"). *See Gerald Metals, Inc. v. United States Int'l Trade Comm'n*, CIT ____, slip op. 98–56 (April 28, 1998). The remand was ordered pursuant to the decision (December 23, 1997) of the Court of Appeals for the Federal Circuit ("Federal Circuit") directing this Court to vacate its decision to affirm the Commission's finding of material injury. *See Gerald Metals, Inc. v.*

United States, 132 F.3d 716 (Fed. Cir. 1997). In particular, this Court ordered the Commission to reconsider its material injury finding in a way that is consistent with the legal standard articulated by the Federal Circuit and takes into account the existence and substitutability of fairly-traded Russian imports of pure magnesium and the increase in the market share of these imports during the period of investigation. *Gerald Metals*, CIT at ____, slip op. 98–56, at 2.

BACKGROUND

Plaintiff Gerald Metals, Inc. ("Gerald Metals") commenced this action under section 516A of the Tariff Act of 1930 for review of the final affirmative determination of the Commission that less-than-fair-value ("LTFV") imports of pure magnesium from Ukraine are causing material injury to the domestic industry. *Magnesium from China, Russia, and Ukraine*, 60 Fed. Reg. 26,456–57 (Int'l Trade Comm'n, May 17, 1995)(final).[1] The Court exercised jurisdiction pursuant to 28 U.S.C. § 1581(c)(1994).

Gerald Metals argued that there was no causal nexus between LTFV imports from Ukraine and material injury to the domestic industry. *See Gerald Metals, Inc. v. United States*, 20 CIT ____, ____, 937 F. Supp. 930, 934 (1996), *vacated*, 132 F.3d 716 (Fed. Cir. 1997). Gerald Metals contended "that, absent any LTFV imports, domestic consumers would have purchased fairly-traded Russian imports," demonstrating that the LTFV imports did not cause any material injury to the domestic industry. *Id.*

The circumstances surrounding the existence of fairly-traded Russian imports of pure magnesium were indeed unique. Only two producers were responsible for all Russian imports of pure magnesium. *See Gerald Metals*, 132 F.3d at 720. Whether the Russian imports arrived as fairly-traded or LTFV was determined solely by which trading company exported the product.[2] *Id.* Therefore, the fairly-traded and LTFV Russian imports of pure magnesium were found to be perfect substitutes for each other. *Id.* In addition, the record indicated that the Commission found both classes of Russian imports to be close substitutes with the LTFV Chinese imports and the LTFV Ukrainian imports. *Id.* at 721.

Nevertheless, this Court affirmed the Commission's finding of material injury by reason of LTFV imports from Ukraine. *See Gerald Metals*,

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[1] The Commission's investigation commenced when, on March 31, 1994, Magnesium Corporation of America, International Union of Operating Engineers, Local 564, and United Steelworkers of America, Local 8319 ("Defendant-Intervenors") filed an antidumping petition under section 732 of the Tariff Act of 1930, *as amended*, 19 U.S.C. § 1673a (1988), alleging material injury by reason of LTFV imports of pure magnesium from China, Russia, and Ukraine. The Commission cumulated the effects of LTFV pure magnesium imports from Russia, China, and Ukraine pursuant to 19 U.S.C. § 1677(7)(C)(iv)(1988).

The Uruguay Round Agreement Act, Pub. L. No. 103–465, tit. II, 108 Stat. 4809, 4842 (1994), amended the antidumping laws. These amendments, however, do not apply to investigations initiated before January 1, 1995, *id.* at § 291(a)(2),(b), which are thus regulated by the pre-existing law. Accordingly, this Court refers to the antidumping statute in effect prior to January 1, 1995. For simplicity, the Court speaks in the present tense when referring to the pre-existing statute.

[2] Unlike the situation in *Algoma Steel Corp., Ltd. v. United States*, 12 CIT 518, 688 F. Supp. 639 (1988), *aff'd*, 7 Fed. Cir. (T) 154, 865 F.2d 240 (1989), this case does not involve the situation where individual sales within the *class* of merchandise determined by Commerce to be sold at LTFV were fairly traded. Rather, pricing by different trading companies, which Commerce assigned dumping margins of either zero percent or 100.25%, determined whether the pure magnesium arrived as fairly-traded or LTFV.

20 CIT at ___, 937 F. Supp. at 942. Although the Commission's final determination did not account for the existence of fairly-traded Russian imports, *see Magnesium from China, Russia, and Ukraine*, USITC Pub. 2885, Inv. Nos. 731–TA–696–698 (May 1995)(Views of the Commission)("Determination")[3], the Court found that record evidence indicated that the Commission did consider them. *See Gerald Metals*, 20 CIT at ___, 937 F. Supp. at 935. Because "[t]he Commission considered the presence and effects of fairly-traded Russian imports[,]" the Court concluded, "its determination [was] in accordance with the law." *Id.* The Court then found substantial evidence to support the Commission's determination that the domestic industry was materially injured by reason of the LTFV Ukrainian imports. *Id.* at ___, 937 F. Supp. at 936.

The Federal Circuit disagreed. On appeal by Gerald Metals, the Federal Circuit concluded that, "[g]iven the unique circumstances of this case [i.e., the presence and substitutability of fairly-traded Russian imports], the record, without more, does not show that LTFV imports were the reason for the harmful effects to the domestic magnesium industry." *Gerald Metals*, 132 F.3d at 722–23. The Federal Circuit held that this Court "erred by applying an incorrect legal test for the amount of contribution to material harm by LTFV goods necessary to satisfy the 'by reason of' standard."[4] *Id.* at 722. The Federal Circuit held that, by failing to adequately account for the presence and substitutability of fairly-traded Russian imports, this Court "followed the reasoning that *any* contribution [by LTFV imports] constitutes sufficient causation to satisfy the 'by reason of' test." *Id.* The Federal Circuit clarified that "evidence of de minimis (e.g., minimal or tangential) causation of injury does not reach the causation level required under the statute." *Id.*

Thus, on April 28, 1998, this Court ordered the Commission,

> to reconsider its material injury finding in a way that is consistent with the legal standard articulated by the [Federal Circuit] and that takes into account the existence and substitutability of fairly-traded Russian imports of pure magnesium and the increase in the market share of said imports during the period of investigation[.]

Gerald Metals, ___ CIT at ___, slip op. 98–56, at 2. On remand, the Commission determined by a two to one majority that an industry in the United States was not materially injured or threatened with material injury by reason of imports of pure magnesium. *See Magnesium from the People's Republic of China, Russia, and Ukraine*, Inv. Nos.

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[3] List 1, Doc. 106; List 2, Doc. 42. List 1 consists of the documents within the public portion of the record made before the Commission. List 2 consists of the documents within the confidential portion of the same record.

[4] Section 735 of the Tariff Act of 1930, *as amended*, 19 U.S.C. § 1673d(b) (1988) provides:

> The Commission shall make a final determination of whether—
>
> (A) an industry in the United States—
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports, or sales (or the likelihood of sales) for importation, of the merchandise with respect to which the administering authority has made an affirmative determination under subsection (a)(1) of this section.

731–TA–696–698 (June 30, 1998)(Final, Remand)("Remand").[5] Upon review of the Commission's remand determination, this Court is presented with the following issues:

1) Whether the Commission reconsidered its material injury finding in a way that is consistent with the legal standard articulated by the Federal Circuit; and

2) Whether the Commission's remand determination that an industry in the United States was not materially injured by reason of imports of pure magnesium from Ukraine is supported by substantial evidence and otherwise in accordance with law.[6]

MATERIAL INJURY BY REASON OF LTFV IMPORTS

An affirmative injury determination by the Commission "requires both (1) present material injury and (2) a finding that the material injury is 'by reason of' the subject imports." *Gerald Metals*, 132 F.3d at 719 (citing 19 U.S.C. § 1673d(b); *see supra* note 4).

According to the Federal Circuit, the "by reason of" standard "mandates a causal—not merely temporal—connection between the LTFV goods and the material injury." *Gerald Metals*, 132 F.3d at 720. The standard "requires adequate evidence to show that the harm occurred 'by reason of' the LTFV imports, not by reason of a minimal or tangential contribution to the material harm * * *." *Id.* at 722.

In examining the causal connection between the LTFV imports and the material injury (i.e., whether material injury occurred *by reason of* the LTFV imports), the Commission is required by statute to consider three factors: "1) the volume of [LTFV] imports, 2) the effect of [LTFV] imports on prices of like domestic products, and 3) the impact of [LTFV] imports on domestic producers of like products." *USX Corp. v. United States*, 11 CIT 82, 84, 655 F. Supp. 487, 489 (1987)(citing 19 U.S.C.

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[5] List 1R, Doc. 132; List 2R, Doc. 56. Remand Record List 1R consists of the documents within the public portion of the record made before the Commission in this remand action. List 2R consists of the documents within the confidential portion of the same record.

[6] Defendant-Intervenors have filed a motion to stay the proceedings in this case pending a final decision in an appeal before the Federal Circuit in *Magnesium Corp. of Am. v. United States*, No. 97–1255 (Fed. Cir.)(the "Commerce Appeal"). *See* Mem. Supp. Def.-Intervenors' Mot. For Stay at 1–2. In the Commerce Appeal, Defendant-Intervenors have challenged Commerce's determination that Russian fairly-traded imports existed. *See id.* at 1. Defendant-Intervenors argue that a reversal by the Federal Circuit of the Commerce Appeal and a subsequent remand to Commerce "could result in a reversal of Commerce's original determination * * * that imports from Russia were sold at fair value." *Id.* at 2. Defendant-Intervenors argue that, because the Commission's remand determination was predicated upon the existence of fairly-traded Russian imports, a reversal of Commerce's original determination "would eliminate the basis for the Commission's finding of no injury in its Remand Determination in this case." *Id.*

More specifically, Defendant-Intervenors argue that a decision by this Court to stay the current proceeding pending a final decision in the Commerce Appeal would: 1) promote the statutory goal of accurate antidumping decision-making; 2) "prevent the irreparable injury to Defendant-Intervenors that would result from loss of the right to effective review of the Commission's Remand Determination[;]" and 3) avoid the possibility that this Court may issue an opinion that is inconsistent with the Federal Circuit's decision in the Commerce Appeal. *Id.*

Stays pending appeal are an extraordinary and disfavored remedy. *See Phillip Brothers, Inc. v. United States*, 10 CIT 448, 453, 640 F. Supp. 261, 265 (1986). Defendant-Intervenors' first and third arguments are not persuasive because this Court "cannot assume anything about what will happen on appeal, and for the lower court to refrain from acting [based] on any suppositions about future events would be both presumptuous and improper." *American Grape Growers Alliance for Fair Trade v. United States*, 9 CIT 568, 569, 622 F. Supp. 295, 296 (1985). Defendant-Intervenors' second argument fails because they have the right to appeal this Court's decision in this case to the Court of Appeals for the Federal Circuit. Should the Federal Circuit decide to reverse and remand in the Commerce Appeal, that court will be an appropriate forum to decide whether this Court's decision on the Commission's remand determination should be remanded as well. This Court would then review the ordered remand determinations. For now, this Court recognizes that, in reviewing a motion to stay proceedings, its "paramount obligation" is to exercise jurisdiction timely in the case properly before it. *See Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997). Therefore, this Court denies Defendant-Intervenors' Motion For Stay.

§ 1677(7)(B)). The Commission evaluates the causal effects of the three factors on the harm to the domestic industry by applying the standards set forth in 19 U.S.C. § 1677(7)(C). *See U.S. Steel Group v. United States*, 96 F.3d 1352, 1360–61 (Fed. Cir. 1996); *Trent Tube Div. v. Avesta Sandvik Tube*, 10 Fed. Cir. (T) 84, 91, 975 F.2d 807, 814 (1992). The relevant portions state:

> (i) Volume
>
> In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.
>
> (ii) Price
>
> In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—
>
> (I) there has been significant price underselling by the imported merchandise as compared with the price of like products of the United States, and
>
> (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.
>
> (iii) Impact on affected domestic industry
>
> In examining the impact required to be considered under subparagraph (B)(iii), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to—
>
> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> (II) factors affecting domestic prices,
>
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, and
>
> (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.
>
> The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.

19 U.S.C. § 1677(7)(C).

The statute requires the Commission to evaluate:

1) whether the volume of the LTFV imports is significant; 2) whether price underselling by the LTFV imports is significant; and 3) whether domestic price depression or suppression caused by the LTFV imports is significant. *Id.* "Significant" is defined as "having or likely to have influ-

ence or effect[;] deserving to be considered[;] important, weighty, notable[.]" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 2116 (1993). In assessing the third factor, impact, the Commission evaluates the bearing of the volume and price effects on the domestic industry, *see* S.Rep. No. 100–71, 100th Cong., 1st Sess. at 116 (1987)("A sound determination of material injury cannot be made unless there is a thorough analysis of the volume of imports, the price effects of those imports, and the impact which imports at that volume and at such prices are having on domestic producers."); *see also Timken Co. v. United States*, 20 CIT ____, ____, 913 F. Supp. 580, 588 (1996); *Iwatsu Electronic Co., Ltd. v. United States*, 15 CIT 44, 51, 758 F. Supp. 1506, 1512 (1991), and routinely determines whether the adverse impact is significant as well. *See Angus Chemical Co. v. United States*, 140 F.3d 1478, 1482 (Fed. Cir. 1998); *General Motors Corp. v. United States*, 17 CIT 697, 700, 827 F. Supp. 774, 779 (1993); *American Spring Wire Corp. v. United States*, 8 CIT 20, 23–24, 590 F. Supp. 1273, 1277 (1984), *aff'd sub nom*, *Armco Inc. v. United States*, 3 Fed. Cir. (T) 123, 760 F.2d 249 (1985).

Thus, after assessing whether the volume, price effects, and impact of the LTFV imports on the domestic industry are significant,[7] the Commission must take an analytically distinct step to comply with the "by reason of" standard: the Commission must determine whether these factors as a whole indicate that the LTFV imports themselves made a material contribution to the injury.[8] *Cf. General Motors*, 17 CIT at 712,

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[7] The presence or absence of any factor is not dispositive to a finding of material injury. *See* 19 U.S.C. § 1677(7)(E)(ii); Moreover, the Commission has discretion to weigh the significance of each factor in light of the circumstances. *Iwatsu Electronic Co.*, 15 CIT at 49, 758 F. Supp. at 1510–11.

[8] The Senate Report to the Trade Agreements Act of 1979 states that, in determining whether material injury occurred by reason of LTFV imports, the issue is not "whether [LTFV] imports are the principal, a substantial, or a significant cause of material injury." S.Rep. No. 96–249, 96th Cong., 1st Sess. at 74 (1979). A subsequent Senate Report, however, diminishes the force of this isolated statement. The Senate Report to the Omnibus Trade Act of 1987 states that the amendments to 19 U.S.C. § 1677(7)(B)–(C) were enacted to clarify current law and original Congressional intent. *See* S.Rep. No. 100–71, 100th Cong., 1st Sess. at 115–16 (1987). This Senate Report indicates a stricter stance on causation. First, it clarifies that, "*in every case*, the Commission is required to consider all three factors of volume, price, and impact." *Id.* at 115 (emphasis added). Second, the report indicates that, when "determining the effect of [LTFV] imports on the domestic industry," the Commission must ask whether the imports "are *materially* injuring the domestic industry[,]" *id.* at 116 (emphasis added), supporting the requirement of a material contribution to the overall harm by the LTFV imports themselves.

The Senate Report to the Trade Agreements Act of 1979 also states that the "law does not * * * contemplate that the effects from [LTFV] imports be weighed against the effects associated with other factors[.]" S. Rep. No. 96–249, 96th Cong., 1st Sess. at 74 (1979). *See also Citrosuco Paulista v. United States*, 12 CIT 1196, 1228, 704 F. Supp. 1075, 1101 (1988)(holding that the Commission may not weigh causes, and an affirmative injury determination is warranted if LTFV imports contribute even minimally); *Metallverken Nederland B.V. v. United States*, 13 CIT 1013, 1026, 728 F. Supp. 730, 740 (1989)("The Commission is not to weigh causes of injury, but is to determine whether the dumped imports contribute to material injury."). The Federal Circuit, however, declined to endorse the 1979 Senate Report. *See Gerald Metals*, 132 F.3d at 722. *But see LMI-La Metalli Industriale, S.p.A.*, 13 CIT 305, 321, 712 F. Supp. 959, 971 (1989)("In determining material injury by reason of imports under investigation, the Commission is not to weigh causes of injury[.]"), *aff'd*, 8 Fed. Cir. (T) 157, 912 F.2d 455 (1990). The Federal Circuit decision in *Gerald Metals* was not an *en banc* decision.

Frequently, several events—each of which is a necessary antecedent and has an appreciable effect—contribute to overall injury to an industry. In some cases, another event may have such a predominant effect in producing the harm as to make the effect of the LTFV imports insignificant and, therefore, to prevent the LTFV imports from being a material factor. (This is not to say, however, that there may not be more than one material factor to injury.) In addition, even if no contributing factors independently have a predominant effect, their combined effect may dilute the effect of the LTFV imports, preventing the LTFV imports from being a material factor. The statute requires that the Commission determine whether the LTFV imports *themselves* made a material contribution to the injury suffered by the domestic industry. *Cf. U.S. Steel Group v. United States*, 18 CIT 1190, 1211–12, 873 F. Supp. 673, 694 (1994)(declining to extend the causation test propagated by the court in *British Steel Corp. v. United States*, which held that "[t]he statute's causation prerequisite to an affirmative determination is satisfied if the * * * imports contribute, even minimally, to the conditions of the domestic industry[.]" 8 CIT 86, 96, 593 F. Supp. 405, 413 (1984), *aff'd*, 96 F.3d 1352 (Fed. Cir. 1996)). *But see Grupo Industrial Camesa v. United States*, 18 CIT 461, 465, 853 F. Supp. 440, 444 (1994)(relying on *British Steel*'s minimal contribution test), *aff'd*, 85 F.3d 1577 (Fed. Cir. 1996).

827 F. Supp. at 788 (upholding the Commission's negative determination where "[t]he factors to which the plaintiffs point[ed] as demonstrating injury [did] not amount to evidence of a significant contribution by the subject merchandise to material injury"). Therefore, proper adherence to the causation analysis incorporated in the statute prevents the Commission from finding material injury by reason of LTFV imports where their contribution to overall harm is *de minimis* (e.g., minimal or tangential).

Our next question, then, is whether the Commission reconsidered its material injury finding in a way that is consistent with this legal standard.

STANDARD OF REVIEW

The Court will uphold a Commission determination in an antidumping investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i)(1994).

DISCUSSION

1. *On remand, did the Commission reconsider its material injury finding in a way that is consistent with the "by reason of" standard?*

On remand, the Commission found by a two to one majority that an industry in the United States was not materially injured by reason of imports of pure magnesium from Ukraine. *See* Remand (Commission's Determination on Remand)(List 1R, Doc. 132). Therefore, the Court here assesses whether the two majority members, Vice Chairman Marcia E. Miller and Commissioner Carol T. Crawford, reasonably interpreted the "by reason of" standard as articulated by the Federal Circuit. The Court notes that the antidumping statute on its face does not compel a single method for analyzing causation, so long as the requirements of 19 U.S.C. § 1677(7)(B)–(C) are met. *See U.S. Steel Group*, 96 F.3d at 1362.

A. Vice Chairman Miller[9]

In discussing the "by reason of" standard, Vice Chairman Miller notes that the Commission is required to "consider the volume of subject imports, their effect on prices for the like product, and their impact on domestic producers of like product." Remand at 4 (Views of Vice Chairman Miller)(List 1R, Doc. 132). Moreover, in her evaluation of the three mandatory factors, Vice Chairman Miller specifically addresses whether each one is significant. *See id.* at 7, 13, and 15. Because Vice Chairman Miller finds each of the three factors to be insignificant, however, it is impossible to say whether she would have taken the analytically distinct step of determining whether the factors as a whole indicate that the LTFV imports themselves made a material contribution to material injury. Still, Vice Chairman Miller does state that she "agree[s] that the 'by reason of' test requires evidence that subject imports con-

[9] Vice Chairman Miller was not a member of the Commission at the time of the original determination, which made an affirmative determination by a three to three vote. Vice Chairman Miller therefore considers the record *de novo*.

tribute more than 'minimally or tangentially' to any material harm being suffered by the industry." *Id.* at 5. Therefore, the Court concludes that her interpretation of the "by reason of" standard is permissible and, therefore, in accordance with law.

B. Commissioner Crawford[10]

In her discussion of the legal standard, Commissioner Crawford also notes that the statute mandates consideration of the LTFV imports' volume, price effects, and impact on the domestic industry. *See* Determination at 41 (Views of Commissioner Crawford)(List 1, Doc. 106)(citing 19 U.S.C. § 1677(7)(B)(i)). Moreover, in her evaluation, Commissioner Crawford specifically addresses the significance of each. *See id.* at 47–49.

Crawford's interpretation of the legal standard also complies with the analytically distinct step of determining whether the factors as a whole indicate a material contribution from LTFV imports themselves because her test requires that the LTFV imports *independently* cause a material injury.[11] *See* Remand at 22 (Views of Commissioner Crawford)(List 1R, Doc. 132). Commissioner Crawford rightfully notes that overall "[i]njury to an industry often occurs as a result of a number of different causes," each of which may separately result in material injury. *Id.* at 22–23. Her analysis ensures that the LTFV imports' contribution to the injury overall is material by requiring that their contribution independently cause, at a minimum, a material injury. *Cf.* S. Rep. No. 100–71, 100th Cong., 1st Sess. at 116 (1987)("When determining the effect of imports on the domestic industry, the Commission must consider all relevant factors that can demonstrate if unfairly traded imports are *materially* injuring the domestic industry.")(emphasis added). Therefore, the Court finds Commissioner Crawford's causation analysis to be a reasonable interpretation of the "by reason of" standard and in accordance with law.

2. *Is the Commission's remand determination that an industry in the United States was not materially injured by reason of imports of pure magnesium from Ukraine supported by substantial evidence and otherwise in accordance with law?*

A. Convertibility of the Russian Imports

This case presents a unique situation in that all Russian imports of pure magnesium originated from only two producers, and the individual trading company exporting to the United States—not the producer—set the prices that determined whether Russian magnesium was fairly

[10] Commissioner Crawford, who dissented in the original determination, states that she believes her legal analysis comports with the Federal Circuit's standard. *See* Remand at 23 (Views of Commissioner Crawford)(List 1R, Doc. 132). Therefore, upon remand, she incorporates her findings, analysis, and views from the original investigation. *See id.*

[11] In her causation analysis, Commissioner Crawford isolates the effects of the LTFV imports by comparing "the state of the industry when imports were dumped with what the state of the industry would have been if the imports had not been dumped." Remand at 23 (Views of Commissioner Crawford)(List 1R, Doc. 132). If she finds that the domestic industry would have been materially better off had the subject imports been priced fairly, she concludes that there is material injury by reason of the LTFV imports. *See* Determination at 42 (Views of Commissioner Crawford)(List 1R, Doc. 106). The Federal Circuit has specifically upheld Crawford's method of causation analysis. *See U.S. Steel*, 96 F.3d at 1362.

traded or LTFV. The finding of convertibility is crucial to the analysis of material injury by reason of LTFV imports. The Federal Circuit held that,

> [w]hile the statute protects domestic magnesium producers from injury caused by LTFV imports, its scope of protection does not reach so far as to support artificially inflated prices when fairly-traded imports are underselling the domestic product and LTFV imports are readily convertible to fairly-traded product by merely changing importers.

Gerald Metals, 132 F.3d at 722. Moreover, the Federal Circuit concluded that, "[w]ithout further explanation, [it could not] adequately review the Court of International Trade's dismissal of the prospect that fairly-traded goods would have replaced the LTFV goods." *Id.* at 721. On remand, the Commission majority finds that the Russian fairly-traded and LTFV imports were convertible. *See* Remand at 5 (Views of Vice Chairman Miller) and at 21–22 (Views of Commissioner Crawford)(List 1R, Doc. 132).[12] As a threshold matter, the Court here evaluates whether the Commission's finding of convertibility is supported by substantial evidence.

The Commission majority finds that, except for the dumping, the fairly-traded and LTFV magnesium imports were identical products. *See id.* at 12 (Views of Vice Chairman Miller); Determination at 45 (Views of Commissioner Crawford)(List 1, Doc. 106). In addition, Commissioner Crawford finds "no evidence on the record to indicate any product differentiation, non-price differences or differences in terms and conditions of sale between dumped Russian imports and fairly traded Russian imports." Determination at 45 (Views of Commissioner Crawford)(List 1, Doc. 106). These findings support the conclusion that the Russian LTFV and fairly-traded imports of pure magnesium were fully convertible.

On remand, the Commission also obtained additional information supporting the conclusion of convertibility. The Commission sent a questionnaire addressing the subject of convertibility to eleven firms that had reported importing pure magnesium from Russia during the period of investigation. All six responding firms "reported that pure magnesium from Russian LTFV sources was used interchangeably with pure magnesium from Russian fairly-traded sources." Memorandum INV-V–047 (June 15, 1998)(List 2R, Doc. 53)("Memorandum"). Moreover, the responding importers unanimously reported "that there were no differences in sales terms or delivery between pure magnesium imported from Russian LTFV and Russian fairly-traded sources." *Id.* The importers were also asked whether there were any constraints (e.g., supply contracts or agreements) on their ability to switch suppliers of pure magnesium. Four importers responded to this question, answering

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[12] Commissioner Crawford found the Russian LTFV and fairly-traded imports to be convertible in her original dissenting determination. *See* Determination at 45 (Views of Commissioner Crawford)(List 1, Doc. 106). She therefore adopts her findings, analysis, and views from the original investigation on remand. *See* Remand at 21–22 (Views of Commissioner Crawford)(List 1R, Doc. 132).

"that there were no constraints on their ability to shift suppliers." *Id.* Finally, the Commission sent questionnaires to the two Russian producers of pure magnesium, and the responding producer reported that its ability to switch among trading companies for exporting magnesium to the United States was unrestricted. *Id.*

Despite these findings, the Defendant-Intervenors (Magnesium Corporation of America, et al.) argue that "the record evidence indicates that the LTFV imports could *not* have been converted to fairly traded Russian imports during the [period of investigation], because there was an inadequate supply of fairly traded Russian imports and because other factors constrained any such conversion." Def.-Intervenors' Comments on ITC Determ. on Remand at 4. First, Defendant-Intervenors argue that the Plaintiff relies on the assumption that fairly-traded Russian imports would replace all or the greatest part of the subject imports. *See id.* at 5. On remand, however, the Commission majority did not find that LTFV imports did not have *any* adverse effects on the domestic industry, but that they did not have any *significant* effects. Therefore, a negative finding is not contingent upon the complete displacement of LTFV imports by Russian fairly-traded imports.

Moreover, Defendant-Intervenors argue that, because the two Russian producers did not have additional pure magnesium to sell, the nine fairly-trading companies would not have had access to extra magnesium to cover the Russian LTFV imports sold to the United States during the period of investigation. *Id.* at 7–8. As the Commission points out, however, this supply limitation argument mistakenly assumes that purchasers would need to find additional metric tons of pure magnesium over and above the combined LTFV and fairly-traded Russian magnesium that was sold in the United States. *See* Def. U.S. ITC Response to Comments on Comm'n Remand Determ. at 23. Given their near perfect substitutability and the absence of physical or contractual restraints on switching sources, the conclusion that LTFV Russian sales could be converted to fairly-traded sales is reasonable. *See id.* at 23.

Defendant-Intervenors also argue that,

> even if the nine fairly trading sources had access to an adequate supply [of Russian pure magnesium], there is no evidence that these nine sources had the business relationships, personnel and other resources necessary to negotiate and complete the purchase and resale of [substantial] additional [amounts] of fairly traded Russian magnesium and to ship that material to the United States.

Def.-Intervenors' Comments on ITC Determ. on Remand at 9. As meritorious as this argument may be, however, record evidence also supports the opposite conclusion. Between 1992 and 1993, the fairly-trading Russian companies increased their volume of exports to the United States exponentially. *See Staff Report to the Commission on Investigations Nos. 731–TA–696–698*, (List 2, Doc. 37) (April 20, 1994), C.R. at I–46, Table 23 ("Staff Report"). If they maintained the "business relationships, personnel, and other resources" to exponentially increase their

export volumes once, the Commission may reasonably conclude these traders could do so again. *See* Def. U.S. ITC Response to Comments on Comm'n Remand Determ. at 30. This conclusion is reinforced by the evidence showing that there were no restrictions on the Russian producers' ability to switch among trading companies for export to the United States. *See* Memorandum.

Moreover, record evidence showing that shifting from Russian LTFV sources to Russian fairly-trading sources actually took place during the period of investigation further discounts Defendant-Intervenors' argument that conversion could not have taken place because of supply constraints and other restrictions. On remand, the Commission asked the firms importing from Russia whether their firms had shifted any of their imports from Russian LTFV sources to Russian fairly-trading sources during the period of investigation. *See* Memorandum. Two of the responding firms reported that they had shifted imports. *See id.*

Defendant-Intervenors, however, argue that the importers' actual written responses "show that the remand investigation actually did not uncover a single instance of shifting from LTFV imports to fairly-traded Russian imports during the period of investigation." Def.-Intervenors' Comments on ITC Determ. on Remand at 12. Defendant-Intervenors point to one of the responding importer's narrative answers, which states that the firm imported magnesium from LTFV sources and then sold that magnesium to companies that were found to be fairly trading magnesium. *See id.* at 14. (citing a Remand Importer Questionnaire at 2 (List 2R, Doc. 48)(June 1, 1998)). Thus, Defendant-Intervenors argue that "[s]uch a sale does not alter the LTFV character of the [responding firm's] imports." *Id.* This argument does not disprove convertibility. The fact remains that the LTFV imports sold by the responding firm were later deemed to be fairly-traded upon the sale to a different trading company. Thus, the purchasing company was able to convert Russian LTFV imports to fairly-traded imports.

Defendant-Intervenors also point to a telephone interview with the second responding importer. *See id.* (citing Comm'n Staff Notes (List 2R, Doc. 45)(June 1, 1998)("Staff Notes")). In the interview, a company representative stated that the importer, "did shift and start buying from different sources[,]" and that it "did shift between different Russian suppliers because it was a fairly trading [company]." *Id.* Defendant-Intervenors argue that, because the company was deemed to be selling at fair value Russian magnesium supplied by both Russian producers, its shifts were not shifts from LTFV to fairly-trading Russian sources. *See* Def.-Intervenors' Comments on ITC Determ. on Remand at 14 (citing *Notice of Antidumping Duty Orders: Pure Magnesium From the People's Republic of China, the Russian Federation and Ukraine*, 60 Fed. Reg. 25,691, 25,692 (Commerce, May 12, 1995)).

In rebuttal, the Commission notes that the finding that the importer sold both Russian producers' merchandise on a fairly-traded basis resulted from the May 1995 amendment to the final determination. *See*

Def. U.S. ITC's Response to Comments on Comm'n's Remand Determ. at 33. According to the Commission, Commerce's original final determination in March 1995 assigned the importer a dumping margin for its purchases from one of the Russian producers and a zero margin for the other. *See id.* at 33–34 (citing *Notice of Final Determinations of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium From the Russian Federation*, 60 Fed. Reg. at 16,449 (Commerce, Mar. 30, 1995)). Thus, argues the Commission, there was a period during which the importer's dumping margin differed depending on the identity of the supplying Russian producer. *See id.* at 34. The Commission concludes that "[t]he most logical interpretation of its statement to the Commission staff is that during this period, [the importer] switched its purchases to a producer whose products would not be subject to duties." *Id.* Thus, the importer shifted its purchases from LTFV to non-LTFV sources.

Therefore, based on the whole record before it and having taken into account contradictory evidence, the Court concludes that substantial evidence supports the Commission's finding of convertibility between Russian LTFV and fairly-traded imports. Although Defendant-Intervenors drew opposite conclusions, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). Moreover, "[i]t is within the Commission's discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence."[13] *Maine Potato Council v. United States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985).

Having resolved this threshold issue, the Court evaluates whether the Commission majority's individual determinations are supported by substantial evidence.

B. Views of Vice Chairman Miller

i) Volume of LTFV Imports

Vice Chairman Miller first evaluates whether the volume of LTFV imports are significant pursuant to 19 U.S.C. § 1677(7)(C)(i). She notes that the volume of the subject imports increased sharply from 1992 to 1993, but then decreased significantly in 1994. *See* Remand at 6 (Views of Vice Chairman Miller)(List 1R, Doc. 132)(citing Staff Report, Table 24, C.R. at I–48). She finds that the value of the cumulated LTFV imports followed a similar trend over the same period. *See id.* (citing Staff

[13] In addition to arguing that substantial evidence does not support the Commission's finding of convertibility, Defendant-Intervenors argue that the Commission has no legal basis for hypothetically converting LTFV imports that were present in the United States during the period of investigation into fairly-traded imports for purposes of causation analysis. *See* Def.-Intervenors' Comments on ITC Determ. on Remand at 4. This argument, however, directly contravenes the Federal Circuit's holding, which required the Commission to consider the convertibility of the LTFV and Russian fairly-traded imports. *See Gerald Metals*, 132 F.3d at 721–22; *see also R-M Industries, Inc. v. United States*, 18 CIT 219, 227, 848 F. Supp. 204, 211 (1994)(affirming that individual Commissioners may consider in their injury determinations whether fairly-traded imports would have replaced LTFV imports if the LTFV imports were absent from the market). Moreover, Defendant-Intervenors argue that speculation regarding purchasers potentially shifting fairly-traded imports is not permissible under the statute. *See* Def.-Intervenors' Comments on ITC Determ. on Remand at 4. Contrary to their assertion, however, the statute can reasonably be interpreted to require the Commission to determine whether price suppression would occur in the absence of LTFV imports. 19 U.S.C. § 1677(7)(C)(ii)(II).

Report, Table 1, C.R. at I–16). Meanwhile, she finds that the domestic share of the pure magnesium market contrasted, decreasing sharply from 1992 to 1993, but regaining "considerable" market share in 1994. *See id.* at 6–7 (citing Staff Report, Table 24, C.R. at I–48).

Despite these findings, Vice Chairman Miller concludes "that the volume of subject imports, either absolutely or relative to production or consumption, is not, at present, significant." *Id.* at 7. Although she notes that the Commission's preliminary affirmative determination in May 1994 may have contributed in part to the LTFV imports' substantial decrease in volume that year,[14] Vice Chairman Miller finds what she believed to be more "compelling" reasons. First, she finds most important that the large increase in subject imports in 1993 resulted from the liquidation of former Soviet stockpiles of pure magnesium that year, which appeared, in her view, to be "an unusual, short-term event." *See id.* at 7 (citing Staff Report, C.R. at I–8). In addition, she finds that Russian imports shifted to other markets, such as Western Europe and Asia, where selling terms had improved significantly. *See id.* (citing Prehearing Br. on Behalf of Russian Producers, (List 2, Doc. 18)(March 22, 1995), C.R. at 13, 17(n.13), and 26("Prehearing Br.")). Finally, Vice Chairman Miller notes the Ukrainian government's decision to allocate more magnesium to domestic consumption. *See id.* (citing Tr. of Proceedings Before the ITC, (List 1, Doc. 73)(March 28, 1995), at 186–87).

In addition, Vice Chairman Miller notes that "the presence of a large and growing volume of fairly traded imports from Russia" further diminished the significance of the volume of the subject imports. *See id.* at 8. The volume of fairly-traded Russian imports increased exponentially from 1992 to 1993 and remained high in 1994. *See* Staff Report, Table 23, C.R. at I–46. The volume of Russian LTFV imports, however, decreased substantially from 1993 to 1994. *See id.*

Based on these findings, the Court holds that Vice Chairman Miller's conclusion that the volume of LTFV imports presently was not significant is supported by substantial evidence. While the Commission's preliminary affirmative determination in May 1994 may have contributed to the substantial decrease in volume of subject imports that year, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo*, 383 U.S. at 620 (1996).

ii) Price Effects of LTFV Imports

In evaluating the subject imports' effect on domestic prices of like merchandise, the Commission must consider whether–

> (I) there has been significant price underselling by the imported merchandise as compared with the price of like product of the United States, and

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[14] In dissent, Chairman Bragg chooses not to rely on data for the second half of 1994 for this reason. *See* Remand at 32 (Dissenting Views of Chairman Lynn M. Bragg)(List 1R, Doc. 132).

(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii).

While Vice Chairman Miller finds that the subject imports undersold domestic pure magnesium in seventeen of twenty-one possible comparisons, *see* Remand at 9 (Views of Vice Chairman Miller)(List 1R, Doc. 132)(citing Staff Report, Table 27, C.R. at I–62), she concludes that the significance of this underselling was mitigated by product differentiation, quality differences, and other non-price factors. *See id.* Thus, Vice Chairman Miller concludes that the subject and domestic imports were "only moderately interchangeable." *Id.* About half of the parties found the Chinese and Ukrainian imports to be inferior to the domestic product. *See id.* at 9–10 (citing Staff Report, C.R. at I–54). Moreover, many purchasers indicated that the smaller size of the LTFV pure magnesium ingots was a disadvantage because of ensuing melt loss. *See id.* at 10 (citing Staff Report, C.R. at I–54). Finally, many purchasers noted that the domestic suppliers were generally more reliable in terms of supply and delivery. *See id.* (citing Staff Report, C.R. at I–55).

Regarding price depression, Vice Chairman Miller notes that domestic prices increased in 1993, when LTFV imports were at their highest levels, and remained high in 1994, when the volumes of LTFV imports had declined. *See id.* at 10–11 (citing Staff Report, Table 25–26, C.R. at I–57 and I–60). Therefore, Vice Chairman Miller concludes that the subject imports did not depress prices to a significant degree. *See id.* at 11. Substantial record evidence supports her claim.

Regarding price suppression, Vice Chairman Miller concludes that "competitive conditions in the domestic market restrained the ability of the domestic industry to raise prices and, therefore, LTFV imports did not suppress prices to a significant degree." *Id.* at 11. Vice Chairman Miller finds the large and growing presence of substitutable fairly-traded Russian imports to be most significant in impeding the domestic industry's ability to raise prices. *See id.*

In dissent, Chairman Bragg notes that "at least some portion of both LTFV and fairly-traded imports that originated from the liquidated Russian stockpile were of lesser quality or at least less reliable in terms of quality and continuity of supply than the U.S. product." Remand at 34 (Dissenting Views of Chairman Bragg)(List 1R, Doc. 132)(citing Staff Report, C.R. at I–54). Based on this information, Chairman Bragg concludes that "those end users for whom quality and reliability of supply were the most important factor were unlikely able to opt out of their contracts with [domestic producers] in order to purchase relatively small quantities of LTFV imports. Thus, [domestic producers'] prices could not move in response to imports." *Id.* Rather than refute Vice Chairman Miller's conclusion that price suppression did not occur, however, Chairman Bragg's argument supports the finding; evidence that the domestic product did not compete with some Russian imports sup-

ports the conclusion that the subject imports did not impede the domestic industry's ability to raise prices.

In addition, Chairman Bragg notes that an increase in unit cost of goods sold ("COGS") experienced by the domestic industry during the period of investigation forced domestic producers to increase prices, limiting the visible price suppressing effects of the LTFV imports. *See id.* at 33–34. Vice Chairman Miller, however, points out that the ratio of domestic COGS to domestic net sales decreased between 1992 and 1993, when the volume of subject imports was increasing, and increased in 1994, when the volume of subject imports was decreasing. *See id.* at 13 (Views of Chairman Miller)(citing Staff Report, Table 9, C.R. at I–29). In sum, because Vice Chairman Miller does not find clear evidence of a cost-price squeeze, she concludes that price suppression could not be attributed to the LTFV imports to a significant degree. *See id.*

Thus, Vice Chairman Miller concludes that the LTFV imports were not the cause of significant domestic price effects. *See id.* Although inconsistent conclusions from the record may be drawn, the Court finds her conclusion to be supported by substantial evidence.

iii) Impact of LTFV Imports on Domestic Industry

With regard to the impact of subject imports on the domestic industry, Vice Chairman Miller notes that, pursuant to the statute, she considers "all relevant economic factors" that bear on the state of the industry, including "output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development." *Id.* (citing 19 U.S.C. § 1677(7)(C)(iii)).

Vice Chairman Miller finds that, although "the domestic industry experienced declines in production, shipments, employment and net sales as the volume of LTFV imports increased[,] * * * the industry also exhibited improved financial performance overall." *Id.* at 14 (citing Staff Report, Table 9, C.R. at I–29). Moreover, the domestic industry's financial performance improved when the volume of LTFV imports increased and worsened as the volume of LTFV imports decreased. *See id.* (comparing Staff Report, Table 9, C.R. at I–29, with Table 1, C.R. at I–16, Table 25, C.R. at I–57, and Table 26, C.R. at I–60). In addition, Vice Chairman Miller notes that while the industry endured certain losses throughout the period of investigation, aggregate industry losses had decreased substantially by 1994. *See id.* at n.59 (citing Staff Report, Table 9, C.R. at I–29). The Court finds Vice Chairman Miller's conclusions regarding impact to be reasonable because no factor in the analysis is dispositive. *See* 19 U.S.C. § 1677(7)(E)(ii); *see also Maine Potato Council v. United States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985)("It is within the Commission's discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence.").

Discussing financial performance in dissent, however, Chairman Bragg points out that, of the three domestic producers, Northwest Al-

loys "sells its magnesium to a related company and therefore its data are somewhat misleading regarding sales in the U.S. market because they do not represent arms-length transactions." Remand at 35 (Dissenting Views of Chairman Bragg). While perhaps somewhat damaging to Vice Chairman Miller's conclusion, this information also suggests that only two out of three domestic producers could have been injured by the LTFV imports because Northwest Alloys did not even compete with these imports.

Of the two remaining domestic producers, Chairman Bragg notes that Dow Chemicals performed poorly, having to close one of its plants at the same time the volume of LTFV imports peaked. *See id.* at 35. While it is true that a Dow official testified at the Commission's hearing that the LTFV imports were, at least partially, the reason for the plant closure, *see* Tr. of Proceedings Before the ITC, (List 1, Doc. 73)(March 28, 1995), at 31–32, Vice Chairman Miller finds the evidence concerning this claim to be mixed. *See* Remand at 15 (Views of Chairman Miller)(List 1R, Doc. 132). Vice Chairman Miller believes that Dow's testimony was undercut by the firm's earlier press release of November 28, 1994, which stated, "the decision to close Plant B is based on the company's long-term projections of the magnesium industry; not on the short-term conditions of today's magnesium marketplace * * * Dow will focus its resources on keeping a single facility in world-class condition[.]" *Id.* (citing Staff Report, C.R. at I–18). In addition, the press release indicates that Dow would be expanding the capacity of its single operating plant. *See id.* Finally, Vice Chairman Miller concludes that, to the extent the decision was based on import competition, it appeared to be based on competition from the Russian fairly-traded imports, as well as LTFV. *See id.* at 15–16. Because "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence[,]" *Consolo*, 383 U.S. at 620, the Court finds Vice Chairman Miller's conclusion to be reasonable.

Vice Chairman Miller also concludes that the Dow plant closure caused the overall industry decline in capacity and employment. *See id.* at 15. Based on her finding that the LTFV imports were not an important cause of the plant closure, the significance of these factors is then discounted.

Having taken into account contradictory evidence, the Court finds Vice Chairman Miller's conclusion that the LTFV imports did not have a significant adverse impact on the domestic industry to be supported by substantial evidence.

iv) Conclusion

The Court finds Vice Chairman Miller's determinations that the volume, price effects, and impact of the LTFV imports were not significant to be supported by substantial evidence on the record. Thus, the Court affirms her finding of no material injury by reason of LTFV imports.

C. Views of Commissioner Crawford

i) Volume of LTFV Imports

As a preliminary matter, Commissioner Crawford finds that there was significant competition in the United States among domestic producers, producers of nonsubject imports, and producers of fairly-traded Russian imports. *See* Determination at 46 (Views of Commissioner Crawford)(List 1, Doc. 106). She then notes that in terms of both quantity and value, the market share of the LTFV imports increased dramatically from 1992 to 1993, but then decreased substantially from 1993 to 1994. *See id.* at 46–47 (citing Staff Report, Table A–6, C.R. at A–18). Commissioner Crawford concludes that, "[b]ased on the small market share of subject imports in 1994 and the conditions of competition in the domestic magnesium market, I find that the volume of subject imports is not significant in light of its price and volume effects."[15] *Id.* at 47.

Based on these findings from the record, the Court finds Crawford's conclusion that the volume of subject imports was not presently significant to be supported by substantial evidence.

ii) Price Effects of LTFV Imports

Because there was no evidence of price depression—since domestic prices increased in 1993 and remained high in 1994—Commissioner Crawford discusses price suppression in detail. *Id.* at 47–48. Pursuant to 19 U.S.C. § 1677(7)(C)(ii)(II), Commissioner Crawford analyzes whether domestic prices would have increased in the absence of the LTFV imports. In making her analysis, Commissioner Crawford examines demand conditions (i.e., whether purchasers would have been willing to pay higher prices for the domestic product) and supply conditions (i.e., whether available capacity and competition in the market would have imposed discipline and prevented price increases for the domestic product) in the United States. *Id.* at 47.

First, Commissioner Crawford assumes that if the subject imports had not been dumped, "they would [have] become more expensive relative to domestic magnesium, fairly traded Russian imports and nonsubject imports." *Id.* at 47. Because the dumping margins for Chinese and Ukrainian imports were very large, Commissioner Crawford assumes that, at fairly-traded prices, imports from these countries "would have been priced out of the market." *Id.* She then gives the domestic industry the benefit of the doubt by "assum[ing] that the entire demand for [Chinese and Ukrainian] imports would have shifted to domestic magnesium." *Id.* Because these two countries held a very small domestic market share in 1994, however, Commissioner Crawford concludes that the "shift in demand to domestic magnesium would have been very small." *Id.*

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[15] As discussed above, Chairman Bragg chooses to not rely on data for the second half of 1994 because she believes there was a significant connection between "the virtual cessation of LTFV imports" and the Commission's May 1994 preliminary affirmative determination. *See supra* note 14 and accompanying text. The Court, however, finds substantial evidence to support Vice Chairman Miller's conclusion that there were "more compelling" reasons for the LTFV imports' decline in volume in 1994. Therefore, the Court finds Crawford's focus on the volume of LTFV imports in 1994 to be reasonable. *See id.*

Because Russian LTFV and fairly-traded imports of pure magnesium were found to be perfect substitutes, and there were no constraints on shifting, Commissioner Crawford concludes that "purchasers would have converted the dumped Russian imports into fairly traded imports by purchasing them through [fair] trading companies." *Id.* at 48. Therefore, she concludes that instead of decreasing, demand for subject Russian imports would have simply shifted to fairly-traded Russian imports. *Id.* Therefore, Commissioner Crawford concludes that the "overall increase in demand for domestic magnesium would have been very small." *Id.*

Finally, because of significant competition in the United States—between domestic producers, nonsubject imports, and fairly-traded Russian imports—and excess domestic production capacity,[16] Commissioner Crawford determines that "[p]rice increases would not have stuck even without unfairly priced subject imports." *Id.* Consequently, Commissioner Crawford finds that "subject imports [were] not having significant effects on prices for domestic magnesium." *Id.*

Based on these findings, the Court finds that Crawford's conclusion regarding the lack of significant price effects is supported by substantial evidence.

iii) Impact of LTFV Imports on Domestic Industry

In evaluating the impact of the subject imports on domestic producers, Commissioner Crawford first acknowledges that she is required by statute to consider "output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, research and development[,] and other related factors." *Id.* (citing 19 U.S.C. § 1677(7)(C)(iii)). Because these factors "either encompass or reflect the volume and price effects of the dumped imports," Commissioner Crawford "gauge[s] the impact of dumping through those effects." *Id.*; *see also* S. Rep. No. 100–71, 100th Cong., 1st Sess. at 116 (1987)("A sound determination of material injury cannot be made unless there is a thorough analysis of the volume of imports, the price effects of those imports, and the impact which imports at that volume and at such prices are having on domestic producers."). Moreover, under Crawford's analysis, "[u]nderstanding the impact on the domestic industry's prices, sales[,] and overall revenues is critical to determining the state of the industry, because the impact on other industry indicators (e.g., employment, wages, etc.) is derived from the impact on the domestic industry's prices, sales, and revenues." *Id.* at 42.

In her determination, Commissioner Crawford restates her finding that "the domestic industry would not have been able to increase its prices if subject imports had been sold at fairly traded prices." *Id.* at 48 (*see supra* p.35–36). In addition, Commissioner Crawford restates her

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[16] In 1994, the domestic industry had fourteen percent of unused capacity, *see* Determination at 46 (Views of Commissioner Crawford)(List 1, Doc. 106)(citing Staff Report, Table A–3, C.R. at A–10 to A–11), which exceeded the total quantity of subject imports that same year. Moreover, Commissioner Crawford notes that the "domestic industry also had substantial inventories available at the end of 1994." *Id.* (citing Staff Report, Table A–3, C.R. at A–10 to A–11).

finding that the overall increase in demand for domestic magnesium would have been "very small." *Id.* (*see supra* p.35). Consequently, Commissioner Crawford concludes that the domestic industry's increase in output and sales, and therefore its revenues, would have been insignificant. *See id.*

Based on these findings, Commissioner Crawford concludes that, because "the domestic industry would not have been able to increase its prices, output or sales, and revenues significantly[,] * * * the domestic industry would not have been materially better off if the subject imports had been fairly traded." *Id.* at 49. Therefore, Commissioner Crawford concludes that the LTFV imports did not have a significant adverse impact on the domestic industry. *Id.*

Based on these findings, the Court finds Crawford's conclusion that the impact of subject imports was not presently significant to be supported by substantial evidence.

iv) Conclusion

The Court finds Crawford's determinations that the volume, price effects, and impact of the LTFV imports were not significant to be supported by substantial evidence on the record. Thus, the Court affirms her finding of no material injury by reason of LTFV imports.[17]

CONCLUSION

The Commission's negative determination of material injury is supported by substantial evidence on the administrative record and otherwise in accordance with law. Accordingly, the Commission's remand determination is affirmed.

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[17] On remand, the Commission also determined that the domestic industry was not threatened with material injury by reason of imports of pure magnesium from Ukraine. The Commission must make its threat determination pursuant to 19 U.S.C. § 1677(7)(F). The statute enumerates a number of factors the Commission must consider in making its determination. *See* 19 U.S.C. § 1677(7)(F)(i)(I)–(X). The determination must "be made on the basis of evidence that the threat of material injury is real and that actual injury is imminent." 19 U.S.C. § 1677(7)(F)(ii). The "determination may not be made on the basis of mere conjecture or supposition." *Id.* Moreover, the section of the antidumping statute that discusses the factors concerning the threat of injury determination also includes the "by reason of" language. *See* 19 U.S.C. § 1677(7)(F)(ii). Therefore, the "by reason of" standard also applies to threat determinations.

No party has challenged the Commission's negative threat determination on remand. Therefore, the matter is not at issue before the Court.

(Slip Op. 98–149)

UNITED STATES OF AMERICA, PLAINTIFF *v.*
SHABAHANG PERSIAN CARPETS, LTD., DEFENDANT

Court No. 96–05–01472

[Defendant's Motion to Join an Additional Party Denied.]

(Dated October 28, 1998)

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Harold D. Lester, Jr.)*; United States Customs Service *(Susan Flood)*, of Counsel, for plaintiff.

Steiner & Schoenfeld, (Gaar W. Steiner, Douglass H. Bartley, and *J.P. Fernandes)* for defendant.

OPINION

GOLDBERG, *Judge:* This matter is before the Court on defendant Shabahang Persian Carpets, Ltd.'s ("Shabahang") motion to join the U.S. Internal Revenue Service ("IRS") as an additional party to this action pursuant to USCIT R. 19. Plaintiff, the United States on behalf of the U.S. Customs Service ("Customs" or "the government"), initiated this case to recover penalties from defendant for allegedly undervaluing merchandise entered between 1984 and 1987. Prior to the start of this case, the IRS also challenged particular aspects of defendant's tax returns. Of particular relevance here, the IRS asserted that defendant overvalued the merchandise at issue on certain tax returns so as to decrease its tax liability. Defendant maintains that because it is faced with allegedly inconsistent obligations to two separate agencies within the U.S. Department of the Treasury and those obligations arise from the same set of transactions, it should be allowed to join the IRS as an additional party. The Court denies defendant's motion.

I.

BACKGROUND

Between March 6, 1984 and November 4, 1987, defendant Shabahang entered certain carpets from Iran under twenty-two consumption entries at the port of Milwaukee, Wisconsin. *See* Compl. ¶ 4. In documents provided with these entries (i.e., the Customs Form 7501), Shabahang represented to Customs that the merchandise had a total declared value of $1,862,612. Customs alleges that Shabahang intentionally understated the value of the carpets in the 22 entries to avoid import duties. More precisely, Customs claims that Shabahang submitted false invoices in support of its entry declarations. *See* Pl.'s Resp. In Opp. To Def.'s Mot. to Join An Add'l. Party ("Pl.'s Resp."), at 4. Customs appears to suggest that the true value of the 22 entries at issue is reflected not in the Customs 7501 forms, but rather in Shabahang's inventory records, records which allegedly document substantially higher prices for the rugs than those declared on the 7501 forms.

For the same rugs, Shabahang apparently chose to report different values for income tax purposes than those used for customs purposes. On its income tax returns for the years 1987 to 1990, Shabahang reported that the value of the carpets comprising the 22 entries was substantially higher at the time of entry than what it reported on the 7501 forms. More specifically, Shabahang informed the IRS that the value of the rugs at issue was based on the amounts appearing in its inventory records.

After an audit, however, the IRS determined in August 1992 that for the years 1987 and 1988, Shabahang owed additional taxes (and penalties), amounting to $399,374 and $371,684, respectively. *See* Def.'s Br. In Supp. of Mot. to Join An Add'l. Party ("Def.'s Br."), at 3. The IRS principally found that Shabahang should incur additional tax liability because it improperly increased its cost of goods sold ("COGS"), and thereby decreased its tax liability, when it based COGS for the rugs at issue on its inventory records rather than the Customs 7501 forms.[1] The IRS and Shabahang later reached a settlement to dispose of this tax liability in April 1995. *See* Pl.'s Resp., at App. 1–3.

Similarly, after an audit for the tax years 1989 and 1990, the IRS determined that Shabahang incorrectly reported its tax liability. According to the IRS, for these years Shabahang erred in reporting the income from the rugs at issue because it again based COGS on its inventory records rather than the Customs 7501 forms. As a result, the IRS assessed penalties and additional taxes in the amount of $258,504 and $214,103 for 1989 and 1990, respectively. *See* Def.'s Br., at Ex. 4. The IRS and Shabahang, however, have not finalized settlement to dispose of the 1989 and 1990 tax liability.

Based on these events, Shabahang now claims that the IRS must be added as an indispensable party to this action. Shabahang insists that "unless [the] IRS is made a party to this action, Shabahang will be faced with double liability and inconsistent obligations over the same transactions." Def.'s Br., at 2–3. That is, Shabahang maintains that the challenges to Shabahang's reporting practices with respect to the 22 entries should be joined so as to force the government "to proceed on a consistent, unified theory of liability." Def.'s Br., at 5.

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[1] When it assessed Shabahang's tax deficiencies, the IRS, *inter alia*, found that Shabahang's reliance on a figure above that declared to Customs directly contravened 26 U.S.C. § 1059A (1994). Def.'s Br., at Ex. A-B. This section of the tax code requires that the amount of any costs "taken into account in computing the basis or inventory cost" for tax purposes "shall not * * * be greater than the amount of such costs taken into account in computing [the] customs value" declared to Customs upon entry. 26 U.S.C. § 1059A. Here, because the inventory records relied upon by Shabahang for income tax purposes stated costs at substantially higher amounts than the cost of the goods as reported on Customs Form 7501, the IRS determined that additional taxes and penalties were owed. Def.'s Br., at Ex. A, 10–11.

II.

DISCUSSION

USCIT R. 19 provides in relevant part as follows:

> **Rule 19. Joinder of Persons Needed for Just Adjudication**
>
> **(a) Persons to be Joined if Feasible.**
>
> A person shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the persons claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (A) as a practical matter impair or impede the person's ability to protect that interest, or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party.

USCIT R. 19(a). Defendant claims that here the conditions for joinder of the IRS under Rule 19 are satisfied in two respects: first, Shabahang cannot be accorded "complete relief" without the presence of the IRS in this suit; and second, Shabahang risks double liability if the IRS is not joined as a party.

The concept of joinder under Rule 19, however, does not exist in a vacuum. Importantly, the jurisdiction of the court may not be expanded simply through its rules. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 n. 13 (1966); *see also Old Republic Ins. Co. v. United States*, 14 CIT 377, 380, 741 F. Supp. 1570, 1574 (1990) (rejecting a Rule 19 joinder order as a basis for jurisdiction because "[a] court cannot confer jurisdiction upon itself where jurisdiction does not otherwise exist"); Wright, Miller and Kane, Federal Practice & Procedure, § 1602, at 21 (2d ed., 1986) (noting that the court cannot use Rule 19 in a way that would extend the subject matter jurisdiction of the federal courts). "[I]t is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction."[2] *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978). Rather, an independent basis of jurisdiction must be established. And, the party asserting jurisdiction "has the burden of proving that jurisdiction in this court is proper." *United States v. Gold Mountain Coffee, Ltd.*, 8 CIT 247, 248–49, 597 F. Supp. 510, 513 (1984). Therefore, before the Court can consider whether Shabahang is correct in asserting that the conditions of Rule 19 are satisfied, it must inquire whether it can assert jurisdiction over the IRS were such joinder to ensue.

In this instance, Shabahang proposes that two statutes, one from the tax code and one from the Administrative Procedures Act ("APA"), en-

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[2] "Since the Rules of the Court of International Trade mirror the Federal Rules of Civil Procedure, it is without question that this court may look to the decisions and commentary on the Federal Rules in the interpretation of its own rules." *Tomoegawa (U.S.A.), Inc. v. United States*, 15 CIT 182, 185–86, 763 F. Supp. 614, 617 (1991) (citations omitted).

able the Court to exercise jurisdiction over the IRS claims.[3] The Court finds Shabahang's jurisdictional arguments unpersuasive and, therefore, denies Shabahang's motion for joinder. The Court reviews below why it is inappropriate to exercise jurisdiction over any of Shabahang's claims involving the IRS.

i. *Mootness*

As an initial matter, the Court notes that certain claims involving the IRS are moot and, hence, the Court cannot exercise jurisdiction over these matters even if Shabahang offered a viable statutory basis for jurisdiction over the IRS claims. It is well established that "[a] court with jurisdiction under Article III of the Constitution will not decide cases that are moot because of an absence of 'subject matter on which the judgment of the court can operate.'" *Torrington Co. v. United States*, ____ Fed. Cir. (T) ____, ____, 44 F.3d 1572, 1577 (1995) (quoting *Ex Parte Baez*, 177 U.S. 378, 390 (1900)).

In this instance, Shabahang settled all tax deficiency matters for two of the four years at issue, 1987 and 1988. *See* Pl.'s Resp., at App. 1–3. Specifically, in April 1995 Shabahang and the IRS agreed that Shabahang should pay additional taxes and penalties, although apparently an amount less than that initially assessed by the IRS. As a result, for tax purposes there is no controversy regarding the valuation of Shabahang's entries for the years 1987 and 1988. And, because they are moot, the Court cannot review the IRS claims for 1987 and 1988 even if there was a jurisdictional hook. Therefore, the remainder of the discussion, which details why it is inappropriate to exercise jurisdiction over the IRS claims, pertains only to the claims for the years 1989 and 1990.

ii. *Jurisdiction to Entertain Tax Claims Under 28 U.S.C. § 1340.*

Shabahang asserts that the Court may exercise subject matter jurisdiction over its tax claims under 28 U.S.C. § 1340. Specifically, Shabahang states that section 1340 "grants the district court or the Court of International Trade original jurisdiction in any civil action arising under Acts of Congress providing for internal revenue or revenue from imports, both present in the instant case." Def.'s Br., at 8. This, however, is not the same language as that actually provided for in section 1340.

> The district courts shall have original jurisdiction of any civil action arising under Acts of Congress providing for internal revenue, or

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[3] In its response to Shabahang's Motion, the government also noted that the Court should not exercise supplemental (i.e., pendent or ancillary) jurisdiction over the IRS claims. Yet, in its brief in support of its Motion, Shabahang never affirmatively asserted supplemental jurisdiction as a ground to review the IRS claims. The Court nonetheless notes that it agrees with the government, and, if asserted, the Court would have declined to exercise its discretionary authority under 28 U.S.C. § 1367 to invoke supplemental jurisdiction over the IRS claims.

In particular, when considering supplemental jurisdiction, a court must be careful not to upset the existing jurisdictional scheme among the federal courts. *See Gold Mountain Coffee*, 8 CIT at 249, 597 F. Supp. at 514 (1984). Congress has established an express jurisdictional framework for challenges to tax assessments. *See* 26 U.S.C. §7421(a) ("no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person" except "as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), and 7426(a) and (b)(1), and 7429(b)" of the Internal Revenue Code). Not surprisingly, the Court of International Trade does not figure in the jurisdictional framework Congress instituted for tax disputes. Consequently, even assuming arguendo that Shabahang asserted supplemental jurisdiction, this Court would have refrained from exercising such jurisdiction over the IRS claims.

> revenue from imports or tonnage *except* matters within the jurisdiction of the Court of International Trade.

28 U.S.C. § 1340 (1994) (emphasis added). Contrary to Shabahang's reading of the statute, it is plain that original jurisdiction over internal revenue matters lies with the district courts, not the Court of International Trade (except in those instances where Congress expressly assigns such matters to the jurisdiction of this court, which is not the case with respect to the instant IRS claims).

Moreover, even if the Court were to assume that section 1340 provided an avenue to trigger original jurisdiction over the tax claims involving the IRS, section 1340 in and of itself does not create jurisdiction. Indeed, section 1340's "general grant of jurisdiction does not constitute a waiver of sovereign immunity." *Murray v. United States*, 686 F.2d 1320, 1324 (8th Cir. 1982) (citations omitted). Rather, consent to suit must be based on some other provision of the Internal Revenue Code. Shabahang fails to identify any other provisions of the tax code that might provide a basis for jurisdiction. Consequently, it is apparent that this Court does not possess original jurisdiction under 28 U.S.C. § 1340 to entertain the outstanding IRS tax assessment claims corresponding to the entries Shabahang made in 1989 and 1990.

iii. *Jurisdiction to Review Tax Claims Under the Administrative Procedures Act.*

Shabahang next claims that this Court may entertain the IRS claims involving Shabahang's 1989 and 1990 entries under the Administrative Procedures Act ("APA"). The relevant section of the APA reads as follows:

> A person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States.

5 U.S.C. § 702 (1994). Shabahang asserts that because it is not seeking monetary relief through its attempt to join the IRS, section 702 serves as an appropriate jurisdictional basis.

The Court disagrees. The Supreme Court has held that "the APA does not afford an implied grant of subject matter jurisdiction permitting federal judicial review of an agency action." *Califano v. Sanders*, 430 U.S. 99, 107 (1977). More specifically, in *Califano* the Supreme Court observed that while 5 U.S.C. § 702 sets forth that affected persons have a right to review of agency action, "[5 U.S.C.] § 703 suggests that this language was not intended as an independent jurisdictional foundation,

since such judicial review is to proceed 'in a court specified by statute' or 'in a court of competent jurisdiction.'" *Id.* at 106, n.6. Accordingly, *Califano* makes clear that the APA cannot serve as an independent basis for this Court to review IRS claims. *See also American Air Parcel Forwarding Co., Ltd. v. United States*, 2 Fed. Cir. (T) 1, 8–9, 718 F.2d 1546, 1552 (1983) ("[C]lear precedent exists that the APA is not a jurisdictional statute and does not confer jurisdiction on a court not already possessing it."); *National Corn Growers Ass'n. v. Baker*, 6 Fed. Cir. (T) 70, 85, 840 F.2d 1547, 1559–60 (1988) ("The APA cannot be used to circumvent properly authorized statutory relief."); *PPG Indus., Inc. v. United States*, 12 CIT 763, 769, 696 F. Supp. 650, 655 (1988) ("Neither the APA under § 701 et seq. nor [28 U.S.C.] § 2201 are designed to grant an independent basis for jurisdiction to this Court.").

iv. *Rule 19 Requirements*

Finally, the Court notes that even if it were able to exercise jurisdiction over the IRS claims, the conditions necessary to satisfy Rule 19 are not present in this case. First, given the current posture, Customs and Shabahang both are in a position to gain complete relief as to the subject matter of the instant case. Second, Shabahang is not in jeopardy of incurring "inconsistent" obligations or liability as a result of the outcome of this case. Congress has set different mandates for the various federal agencies charged with overseeing imports. And, the Court recognizes that as a result many and varied administrative obligations arise as between these regulatory regimes for a party who seeks to import merchandise from abroad.[4] Yet, these obligations are not inconsistent simply because they are different.

Moreover, in this instance it appears that the regulatory obligations provided for in section 1059A of the tax code required the importer to report its cost basis for tax purposes in a manner that did not conflict with the reporting it used for customs purposes. *See supra* note 1. Therefore, here at least, the reporting requirements between the two agencies do not appear to be inconsistent. And, hence, defendant, not the regulatory regimes, must shoulder the blame for any "inconsistent" liability it might incur as a result of its reporting practices for the merchandise at issue.

III.

CONCLUSION

For the foregoing reasons, the Court denies Shabahang's motion to join the IRS as an additional party pursuant to USCIT R. 19. A separate Order will be entered accordingly.

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[4] *See* James P. Durling & Kenneth J. Pierce, *Transfer Pricing Quadrangulation*, The Metropolitan Corporate Counsel, October 1996, at 6 (noting that companies importing for foreign affiliates need to pay close attention to pricing policies because various federal agencies, including Customs, the IRS, the Department of Commerce, and the Department of Justice and Federal Trade Commission, have differing mandates).

(Slip Op. 98–150)

ECKSTROM INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES, AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS

Court No. 97–10–01913

[Commerce's determination regarding the scope of the Order remanded.]

(Decided October 28, 1998)

Powell, Goldstein, Frazer & Murphy, LLP, (N. David Palmeter, Susan M. Mathews, and *Ronald E. Minsk)* for Plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *David M. Cohen,* Director, *Lucius B. Lau,* Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; Of Counsel, *Linda A. Andros,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, Department of Commerce, Counsel for Defendant.

OPINION

POGUE, *Judge:* This case is before the Court on Plaintiff's motion for judgment on the agency record pursuant to USCIT R. 56.2. The Plaintiff, Eckstrom Industries, Inc. ("Eckstrom"), challenges the determination of the Department of Commerce ("Commerce") that cast stainless steel butt-weld pipe fittings imported by Eckstrom are within the scope of the antidumping duty order on stainless steel butt-weld pipe fittings from Taiwan. *See Amended Final Determination and Antidumping Duty Order: Certain Welded Stainless Steel Butt-Weld Pipe Fittings From Taiwan,* 58 Fed. Reg. 33,250 (Dep't Commerce, June 16, 1993)(Pub. Doc. 4) ("Amended Final Determination"). Commerce issued its determination on September 29, 1997. *See Final Affirmative Scope Ruling-Antidumping Duty Order on Stainless Steel Butt-Weld Pipe Fittings from Taiwan (A–583–816); Eckstrom Industries, Inc.,* (September 29, 1997)(Pub. Doc. 8)("Final Scope Ruling"). The Court has jurisdiction over this matter under 28 U.S.C. § 1581(c)(1994).

BACKGROUND

A. The Documentary Record

On May 20, 1992, the Flowline Division of Markovitz Enterprises, Inc. ("Flowline") petitioned Commerce for the imposition of antidumping duties on "stainless steel butt-weld pipe fittings under 14 inches (inside diameter) imported from Taiwan and the Republic of Korea." *See* Petition for the Imposition of Antidumping Duties, (May 20, 1992)(Pub. Doc. 1) at 1 ("Petition"). In its petition, Flowline explained that,

> Stainless steel butt-weld pipe fittings are used to connect pipe sections in piping systems where conditions require welded connections, as distinguished from fittings designed for other fastening methods (e.g., threaded, grooved, or bolted fittings). Stainless steel butt-weld fittings are used where one or more of the following conditions is a factor in designing the piping system: (1) corrosion of

> the piping system will occur if material other than stainless steel is used; (2) contamination of the material in the system by the system itself must be prevented; (3) high temperatures (in excess of 300°F) are present; (4) extreme low temperatures are present; (5) high pressures are contained within the system.

Petition at 3–4.

In defining the scope of its petition, Flowline first referenced subheading 7307.23 of the Harmonized Tariff Schedule ("HTSUS"). *Id.* at 1. Flowline next described the applicable specifications:

> More specifically, the fittings subject to this petition are designated under Specification ASTM A403/A403M–1991, the standard specification for Wrought Austenitic Stainless Steel Pipe Fittings. * * * All products in these specifications are within the scope of this petition, including 90° long radius elbows, 90° reducing elbows, 90° short radius elbows, 45° long radius elbows, 180° long radius returns, caps, straight tees, reducing outlet tees, stub ends, concentric reducers, eccentric reducers, straight crosses, and reducing outlet crosses * * *.

Id. at 1–2. Referring to the tariff and product specifications, Flowline stated, "[the] scope of this petition includes both finished fittings under these classifications, as well as unfinished fittings capable of meeting these specifications. It excludes threaded, grooved, and bolted fittings." *Id.* at 2.

Finally, Flowline described the manufacturing process by which the pipe fittings subject to its petition are made: "stainless steel butt-weld pipe fittings are generally cold-formed from fusion-welded stainless steel pipe. However, production of some types of stainless steel fittings, notably 'stub ends[,]' requires heating the raw material and performing forging operations." *Id.* at 5.

In response to Flowline's petition, Commerce began an investigation. In its initiation notice, Commerce defined the scope of the investigations: "[t]he products subject to these investigations are stainless steel butt-weld pipe fittings, whether finished or unfinished, under 14 inches inside diameter." *Initiation of Antidumping Duty Investigations: Certain Stainless Steel Butt-Weld Pipe Fittings from the Republic of Korea and Taiwan*, 57 Fed. Reg. 26,645 (Dep't Commerce, June 15, 1992)(Pub. Doc. 2)("Initiation Notice").

Commerce further explained that,

> The subject merchandise is used where one or more of the following conditions is a factor in designing the piping system: (1) Corrosion of the piping system will occur if material other than stainless steel is used; (2) contamination of the material in the system by the system itself must be prevented; (3) high temperatures are present; (4) extreme low temperatures are present; (5) high pressures are contained within the system.

Id. Moreover, Commerce indicated that, "[s]tainless steel butt-weld pipe fittings come in a variety of shapes, with the following five shapes the most basic: 'elbows', 'tees', 'reducers', 'stub ends', and 'caps'." *Id.* Final-

ly, Commerce stated that, "[t]he stainless steel butt-weld pipe fittings subject to these investigations are classifiable under subheading 7307.23.00 of the [HTSUS.]" *Id.* In referencing the applicable tariff classification, however, Commerce disclaimed that, "[a]lthough the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of these investigations is dispositive." *Id.*

In its preliminary determination, Commerce defined the scope of investigation the same way it had in the Initiation Notice. *See Preliminary Determination of Sales at Less Than Fair Value: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan*, 57 Fed. Reg. 61,047–48 (Dep't Commerce, December 23, 1992) ("Preliminary Determination"). In its final determination, however, Commerce defined the scope of investigation in the same manner as previously, except for the inclusion of the adjective "welded" in the second sentence of the scope definition: "[c]ertain *welded* stainless steel butt-weld pipe fittings[.]" *Final Determination of Sales at Less Than Fair Value: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan*, 58 Fed. Reg. 28,556 (Dep't Commerce, May 14, 1993)("Final Determination").

Concurrent with Commerce's investigation of whether the subject imports were being sold at less than fair value, the International Trade Commission (the "Commission") conducted its investigation of whether the subject imports were causing material injury or the threat of material injury to the domestic industry. In conducting its investigation, the Commission sent questionnaires to importers and domestic producers of stainless steel butt-weld pipe fittings. In each questionnaire, the Commission specified that the subject pipe fittings "are provided for in subheading 7307.23.00" of the HTSUS without an accompanying disclaimer. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at Exhibit 5 ("Importers' Questionnaire") and Exhibit 7 ("U.S. Producers' Questionnaire").

In its final affirmative determination, the Commission found that "an industry in the United States is materially injured by reason of imports from Taiwan of certain stainless steel butt-weld pipe fittings, whether finished or unfinished, under 14 inches inside diameter, provided for in subheading 7307.23.00 of the Harmonized Tariff Schedule of the United States[.]" *Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan*, USITC Pub. 2641, Inv. No. 731–TA–564 (Final)(June 1993) at 1. In defining the scope of its investigation, the Commission incorporated by reference its like product discussion in *Certain Stainless Steel Butt-Weld Pipe Fittings from Korea*, USITC Pub. 2601, Inv. No. 731–TA–563 (Final)(Feb. 1993)(Pub. Doc. 3)("ITC Final Determination").

In its final determination, the Commission stated that, "[i]mports of the subject stainless steel butt-weld pipe fittings are classified in HTS subheading 7307.23.00[.]" *Id.* at I–9. No disclaimer was included. With regard to product specifications, the Commission stated, "[t]he fittings themselves are usually designated under the performance specifications of ASTM A403/A403M–1991 and the dimensional specifications of

ANSI B16.9–1986 and ANSI B16.28–1986." *Id.* at I–7. In describing the manufacturing process, the Commission explained,

> [t]he domestic manufacturing sector includes integrated producers and combination producers. Integrated producers begin with stainless pipe as their raw material and perform forming, machining, and finishing operations. Combination producers produce some fittings in an integrated process and other fittings in a conversion process (performing only machining and finishing operations).
>
> Generally, stainless steel butt-weld pipe fittings are cold formed from fusion-welded or seamless stainless steel pipe. However, production of some types of fittings, notably stub-ends, requires heating the raw material and performing forging operations.

Id. at I–6.

Having made an affirmative dumping finding in the underlying action, Commerce made its final determination of the scope of the antidumping duty order on June 16, 1993. *See* Amended Final Determination at 33,250. Commerce entitled the determination, "Certain *Welded* Stainless Steel Butt-Weld Pipe Fittings From Taiwan." *Id.* (emphasis added). Moreover, in the Scope of Order[1] section of the determination, the second sentence began, "[c]ertain *welded* stainless steel butt-weld pipe fittings * * *." *Id.* (emphasis added).

The Scope of Order stated that "[t]he pipe fittings subject to these investigations are classifiable under subheading 7307.23.00 of the [HTSUS]." *Id.* at 33,250. Nevertheless, as with the Initiation Notice, Preliminary Determination, and Final Determination, Commerce provided the following disclaimer: "[A]lthough the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of these investigations is dispositive." *Id.*

B. The Final Scope Ruling

Eckstrom imports *cast* stainless steel butt-weld pipe fittings. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 1. Pursuant to 19 C.F.R. § 351.225(d),[2] Eckstrom requested that Commerce issue an expedited scope ruling

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[1] The Scope of Order will be referred to throughout this Opinion. Scope of Order will only refer to the scope description within the Amended Final Determination.

The text of the Scope of Order states,

> [t]he products subject to this investigation are certain stainless steel butt-weld pipe fittings, whether finished or unfinished, under 14 inches inside diameter.
>
> Certain welded stainless steel butt-weld pipe fittings (pipe fittings) are used to connect pipe sections in piping systems where conditions require welded connections. The subject merchandise is used where one or more of the following conditions is a factor in designing the piping system: (1) Corrosion of the piping system will occur if material other than stainless steel is used; (2) contamination of the material in the system by the system itself must be prevented; (3) high temperatures are present; (4) extreme low temperatures are present; (5) high pressures are contained within the system.
>
> Pipe fittings come in a variety of shapes, with the following five shapes the most basic: 'elbows', 'tees', 'reducers', 'stub ends', and 'caps'. The edges of finished pipe fittings are beveled. Threaded, grooved, and bolted fittings are excluded from these investigations. The pipe fittings subject to these investigations are classifiable under subheading 7307.23.00 of the Harmonized Tariff Schedule of the United States (HTSUS).
>
> Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of these investigations is dispositive.

Amended Final Determination at 33,250.

[2] The regulation that governed Commerce's scope ruling in this case, 19 C.F.R. § 351.225, became effective May 19, 1997. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,295, at 27,403–05 (final rule, May 19, 1997). The applicable provisions are still in force today.

§ 351.225(c) provides that, "[a]ny interested party may apply for a ruling as to whether a particular product is within the scope of an order[.]"

"that Eckstrom's imports of stainless steel castings are not within the scope of the referenced antidumping order." Pl.'s Request for AD Scope Ruling, (Aug. 14, 1997)(Pub. Doc. 6) at 1 ("Scope Request").

Eckstrom argued that its "imports of *cast* pipe fittings are not covered by [the] order dealing with *welded* fittings." *Id.* at 1–2. According to Eckstrom, its "castings bear no similarity to the merchandise covered by the order in design, content, or application, except for usage of the common name 'stubend.'" *Id.* at 2. Specifically, Eckstrom explained that its "castings are designed to be used for low pressure sanitary or corrosive applications in the food or pulp industries, and cannot be used in the following applications covered by the order—contamination, high temperature, extreme low temperature, and high pressure." *Id.* Eckstrom further explained that "[t]he 'stubend' covered under the order is made to specification ASTM A403 from *welded* pipe * * * [whereas] [t]he Eckstrom 'cast stubend' is produced from *cast* rather than welded pipe, is not produced to conform to any particular standard, and does not conform to the dimensional requirements of ASTM A403." *Id.* Finally, Eckstrom argued that, because its imports are classified under HTSUS subheading 7307.19.90.80 covering "cast fittings of stainless steel," the antidumping duty order, which referenced subheading 7307.23.00 covering "butt welding fittings," excluded its imports. *Id.* at 3.

Pursuant to 19 C.F.R. § 351.225(d), Commerce issued a final ruling determining that the scope of the antidumping order includes Eckstrom's imports. *See* Final Scope Ruling. Commerce issued its ruling pursuant to § 351.225(d), which provides that if Commerce "can determine, based solely upon the application [for a scope request] and the descriptions of the merchandise referred to in paragraph (k)(1) of this section, whether a product is included within the scope of an order * * *, [Commerce] will issue a final ruling[.]" Paragraph (k)(1) states that Commerce must take into account "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the Commission." If the criteria in paragraph (k)(1) are "dispositive," Commerce may issue an expedited final ruling without conducting a formal scope inquiry. *See* 19 C.F.R. § 351.225(d).

Evaluating Eckstrom's scope request, Commerce determined that the descriptions of the product in the petition, the final determinations of Commerce and the Commission, and the antidumping duty order are dispositive, clearly and unambiguously including Eckstrom's imports within their scope. *See* Final Scope Ruling at 2. In sum, Commerce concluded that,

> The petition, the investigations of the Department and the Commission, and the final antidumping duty order covered stainless steel butt-weld pipe fittings under fourteen inches in inside diameter which are intended for, *inter alia*, use in food processing lines where corrosion or contamination must be controlled. Based on the evidence in the record of this scope inquiry, we conclude that, as to Eckstrom's fittings which are under fourteen inches in inside diam-

> eter, these products are made from stainless steel. Eckstrom's fittings are of the type intended for use in food processing lines requiring sanitary and corrosion-resistant fittings. Finally, these stub-ends will be connected to pipe sections by means of a butt-weld, as demonstrated by the beveling on the end of the fitting opposite the flange. From the record evidence, we must conclude that Eckstrom's stub-ends are stainless steel butt-weld pipe fittings specifically within the scope of the antidumping duty order.

Final Ruling at 6.

On May 18, 1998, Eckstrom filed its Motion for Judgment on the Agency Record, seeking a reversal of Commerce's Final Ruling that Eckstrom's imports are within the scope of the antidumping duty order on stainless steel butt-weld pipe fittings from Taiwan.

STANDARD OF REVIEW

The Court reviews Commerce's scope determination to decide whether it is in accordance with law and supported by substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i)(1994).

DISCUSSION

Commerce "enjoys substantial freedom to interpret and clarify its antidumping orders. But while it may interpret those orders, it may not change them." *Ericsson GE Mobile Communications, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995); *see also*, *Wirth Limited v. United States*, 22 CIT ____, ____, 5 F. Supp.2d 968, 976 (1998), *appeal docketed*, No. 98–1391 (Fed. Cir. May 27, 1998); *Mitsubishi Elec. Corp. v. United States*, 16 CIT 730, 733–34, 802 F. Supp. 455, 458 (1992). Rather, "[e]ach stage of the statutory proceeding maintains the scope passed on from the previous stage." *UST, Inc. v. United States*, 9 CIT 352, 356 (1985). An expansion of the scope of the order is impermissible and not in accordance with law. *See Mitsubishi*, 16 CIT at 736, 802 F. Supp. at 460. Moreover, Commerce's "discretion must be exercised reasonably and any consequent determination must be supported by substantial evidence in the administrative record." *SKF USA, Inc. v. United States*, 15 CIT 152, 156, 762 F. Supp. 344, 348 (1991), *aff'd*, 972 F.2d 1355 (Fed. Cir. 1992); *Mitsubishi*, 16 CIT at 737, 802 F. Supp. at 461.

Commerce must make its scope determination in accordance with 19 C.F.R. § 351.225(k). *See New England Tank Industries of New Hampshire, Inc. v. United States*, 861 F.2d 685, 694 (Fed. Cir. 1988)("It is mandatory regulations that 'have the force and effect of law.'")(citing *Accardi v. Shaugnessy*, 347 U.S. 260, 265 (1954)). *But see American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970)(holding that an agency is not bound by regulations that "are mere aids to the exercise of the agency's independent discretion"). Thus, Commerce is required to consider "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1); *see also Wirth*, 22 CIT at ____, 5 F. Supp.2d at 976; *Wheatland Tube Co. v. United States*, 21 CIT ____, ____, 973 F.

Supp. 149, 155 (1997), *appeal docketed*, No. 98–1102 (Fed. Cir. Sept. 15, 1997); *Ericsson GE Mobile Communications, Inc. v. United States*, 21 CIT ____, ____, 955 F. Supp. 1510, 1520–21 (1997).

When the above descriptions "are not dispositive, [Commerce] will further consider: (i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2); *see also Wirth*, 22 CIT at ____, 5 F. Supp.2d at 979; *Wheatland*, 21 CIT at ____, 973 F. Supp. at 155; *Ericsson*, 21 CIT at ____, 955 F. Supp. at 1521. This court has held that where the descriptions in paragraph (k)(1) are ambiguous, they are not dispositive; Commerce must then resort to the second prong at paragraph (k)(2). *See Koyo Seiko Co., Ltd. v. United States*, No. 98–1050, at 9 (Fed. Cir. July 28, 1998); *Wirth*, 22 CIT at ____, 5 F. Supp.2d at 978, 979.

Eckstrom argues that Commerce failed to "adequately consider" the petition, the record of the Commission's initial investigation, the determinations of the Commission and of Commerce, and the Scope of Order in violation of its own regulations. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 11. "Had [Commerce] done so," Eckstrom states, "it could not have reasonably determined that cast stainless steel butt-weld pipe fittings were within the scope of the order." *Id.* Eckstrom concludes that Commerce's determination in its Final Scope Ruling was, therefore, an impermissible expansion of the scope of the order and not in accordance with law. *Id.* at 8, 11.

This Court disagrees. Commerce maintains substantial discretion to interpret and clarify its antidumping orders. *See Ericsson*, 60 F.3d at 782. Commerce must do so, however, in accordance with its regulations. § 351.225(k)(1) requires the threshold determination of whether the descriptions of the product covered in the petition, the initial investigation, and the final determinations are dispositive. Therefore, the sole question before the Court is whether Commerce's § 351.225(k)(1) determination is supported by substantial evidence.

A. The Petition

19 C.F.R. § 351.225(k)(1) requires Commerce to first consider the petition. "In * * * a scope investigation, where Commerce examines the description of the merchandise contained in the petition, Commerce must give ample deference to the intent of the petitioner." *Koyo Seiko Co., Ltd. v. United States*, 22 CIT ____, ____, 955 F. Supp. 1532, 1537 (1997).

Here, the petition states that its scope covers "stainless steel butt-weld pipe fittings under 14 inches (inside diameter) imported from Taiwan and the Republic of Korea." Petition at 1. The Defendant argues that this language expressly includes Eckstrom's cast pipe fittings. *See* Def.'s Mem. Opp'n to Mot. J. Agency R. at 18. Moreover, Commerce points out that Eckstrom's fittings are used for corrosive applications, a

use that was specifically provided for in the petition. *See* Final Scope Ruling at 5.

Eckstrom points out, however, that the petition references the products subject to its scope by: 1) a tariff classification that specifically excludes cast pipe fittings, *see* Pl.'s Mem. Supp. Mot. J. Agency R. at 11–12; 2) specifications that explicitly exclude cast pipe fittings, *see id.* at 12; and 3) a completely different manufacturing process than that used to produce cast pipe fittings, *see id.* at 13–14.

1. Tariff Classification

The petition states that "[t]he pipe fittings subject to this petition are classifiable * * * under 7307.23 of the Harmonized Tariff Schedule." Petition at 1. Subheading 7307.23.00 covers "butt welding fittings."[3] *See* HTSUS (1997). Eckstrom points out, however, that its cast pipe fittings are not classified under subheading 7307.23.00, but under subheading 7307.19.90.80, which covers cast fittings of stainless steel. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 12 (citing HTSUS (1997)). Therefore, Eckstrom argues, the petitioner intended to specifically exclude cast pipe fittings from the scope of the petition. *See id.*

In *Wheatland Tube Co. v. United States*, this court recognized that a petitioner may reference a tariff classification to define its scope. *See* 21 CIT at ____, 973 F. Supp. at 157. In distinguishing *Wheatland*, however, this court later held that "[t]he inclusion of various HTSUS headings in a petition ordinarily should not be interpreted to exclude merchandise determined to be within the scope of the antidumping * * * duty order[] but classified under an HTSUS heading not listed in the petition." *Wirth*, 22 CIT at ____, 5 F. Supp.2d at 977–78. The *Wirth* court found *Wheatland* inapplicable because in *Wheatland* the petitioner had relied solely on the HTSUS classification in defining the scope of its petition. *See id.* at ____, 5 F. Supp.2d at 977. Although the HTSUS subheading in the petition in *Wirth* excluded the plaintiff's imports, the court still found substantial evidence to support Commerce's determination that the petition's scope was ambiguous. *See id.* at ____, 5 F. Supp.2d at 978. The issue then turns on the use of a tariff classification in the petition.

Here, the Defendant argues that Flowline did not express the intent to limit its petition solely to merchandise entered under HTSUS subheading 7307.23.00. *See* Def.'s Mem. Opp'n to Mot. J. Agency R. at 20. Moreover, the Defendant argues that even if Flowline had "intended to base the scope of the orders upon tariff classification categories, it was well within Commerce's authority to state that the written descriptions of the scope are dispositive, not the tariff classification numbers." *Id.* As support for this proposition, the Defendant quotes *Mitsubishi Elec. Corp. v. United States*, 8 Fed. Cir. (T) 45, 50, 898 F.2d 1577, 1582 (1990): "The responsibility to determine the proper scope of the investigation and of the antidumping order * * * is that of the Administration, not of

[3] HTSUS heading 7307 covers "[t]ube or pipe fittings (for example, couplings, elbows, sleeves), of iron or steel[.]" HTSUS (1997).

the complainant before the agency." "Complainant" in that sentence, however, refers to the importer that challenged Commerce's scope determination, not to the original petitioner. *See id.* Contrary to Commerce's assertion, when "Commerce examines the description of the merchandise contained in the petition, Commerce must give ample deference to the petitioner." *Koyo Seiko*, 21 CIT at ____, 955 F. Supp. at 1537.

Here, the petitioner clearly stated that the pipe fittings subject to its petition are classifiable under HTSUS subheading 7307.23.00. *See* Petition at 1. Because the tariff schedules are written in the language of commerce, the petitioner was presumptively aware that HTSUS subheading 7307.23.00 excluded cast fittings. *Cf. Permagrain Products, Inc. v. United States*, 9 CIT 426, 429, 623 F. Supp. 1246, 1248 (1985)("It is well established that tariff terms are to be construed in accordance with their common and commercial meanings."). Moreover, unlike the situation in *Wirth*, Eckstrom's imports were not subsequently reclassified to be within the HTSUS subheading referenced by the petitioner. *See Wirth*, 22 CIT at ____, 5 F. Supp.2d at 972. We recognize Commerce's authority to determine the proper scope of the order. Nonetheless, here, the petitioner's tariff classification reference is not consistent with Commerce's conclusion that the petition unambiguously covers Eckstrom's cast pipe fittings.

2. Product Specification

The petition states that "the fittings subject to this petition are designated under Specification ASTM A403/A403M–1991, the standard specification for Wrought Austenitic Stainless Steel Pipe Fittings * * *." Petition at 1. "The term 'wrought' distinguishes forged iron or steel pipe from cast-iron pipe." THE MAKING, SHAPING AND TREATING OF STEEL 1019 (William T. Lankford, Jr. et al. eds., 10th ed. 1985). Moreover, the specification explicitly excludes cast fittings. *See* Scope Request at Exhibit 1A (Standard Specification for Wrought Austenitic Stainless Steel Pipe Fittings).

The Defendant argues that there is no indication that the petitioner intended to limit the scope to merchandise manufactured according to specified industry standards. *See* Def.'s Mem. Opp'n to Mot. J. Agency R. at 21. Eckstrom points out, however, that all of the product standards listed in the petition are explicitly applicable solely to pipe fittings made from welded pipe. *See* Pl.'s Reply Mem. Supp. Mot. J. Agency R. at 6–7. Moreover, referring to the tariff and product specifications, the petition states, "[the] scope of this petition includes both finished fittings under these classifications, as well as unfinished fittings capable of meetings these specifications. It excludes threaded, grooved, and bolted fittings." Petition at 2. Therefore, even though cast fittings are not listed as an exclusion, because cast fittings do not fall within the listed specifications, the petition appears to exclude them. Thus, at a minimum, the petitioner's product specification reference is not consistent with Commerce's

conclusion that the petition unambiguously covers Eckstrom's cast pipe fittings.

3. Manufacturing Process

The petition states that "stainless steel butt-weld pipe fittings are generally cold-formed from fusion-welded stainless steel pipe. However, production of some types of stainless steel fittings, notably 'stub ends', requires heating the raw material and performing forging operations." Petition at 5. As Eckstrom points out, however, cast pipe fittings are neither cold-formed nor made from steel pipe; rather, cast pipe fittings are made by pouring molten metal into a mold of the desired shape. *See* Pl.'s Reply Mem. Supp. Mot. J. Agency R. at 3–4 (citing THE MAKING, SHAPING AND TREATING OF STEEL 1205 (William T. Lankford, Jr. et al. eds., 10th ed. 1985)).

The Defendant rebuts that the petition indicates that the subject pipe fittings are "generally" cold-formed from fusion-welded pipe, allowing room for alternative manufacturing processes. *See* Def.'s Mem. Opp'n to Mot. J. Agency R. at 21. As Eckstrom demonstrates, however, the Defendant's argument ignores the exception already provided by the petitioner in the following sentence: "However, production of some types of stainless steel fittings, notably 'stub ends', requires heating the raw material and performing forging operations." *See* Pl.'s Reply Mem. Supp. Mot. J. Agency R. at 8 (citing Petition at 5). Because both the general and exceptional manufacturing processes listed by the petitioner involve a forging process in which welded pipe is the raw material, the petition appears to exclude Eckstrom's cast pipe fittings from its scope.

Thus, the petitioner's description of the manufacturing process by which the intended subject imports are produced is not consistent with Commerce's conclusion that the petition unambiguously covers Eckstrom's cast pipe fittings.

4. Conclusion

Although the petition's opening scope reference—"stainless steel butt-weld pipe fittings"—and description of applications are broad enough to include Eckstrom's imports, the petitioner's use of the tariff classification, product specifications, and description of the manufacturing process are not consistent with that conclusion. Based on these findings, Commerce's determination that the petition unambiguously includes cast stub ends in its scope is not supported by substantial evidence.

B. The Initial Investigation

In making its scope determination pursuant to 19 C.F.R. § 351.225(k)(1), Commerce must also examine the initial investigations of the Commission and Commerce.

1. The Commission's Investigation

"[A]n antidumping duty order must be supported by an ITC determination of material injury covering the merchandise in question."

Wheatland, 21 CIT at ____, 973. F. Supp. at 158 (citing 19 U.S.C. § 1673 (1994)). In its Final Scope Ruling, Commerce determined that the Commission had defined the like product as "stainless steel butt-weld pipe fittings, whether finished or unfinished, under fourteen inches in inside diameter." *See* Def.'s Mem. Opp'n to Mot. J. Agency R. at 27. Eckstrom argues, however, that the Commission never investigated whether cast pipe fittings were causing injury to the domestic industry in direct opposition to 19 U.S.C. § 1673 (1994). *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 16. The Defendant rebuts that "[t]here is no indication that the Commission was soliciting information solely regarding fittings which were manufactured from welded pipe (as opposed to fittings which are cast)." Def.'s Mem. Opp'n to Mot. J. Agency R. at 26.

In support of its position that the Commission never investigated cast pipe fittings, Eckstrom refers to questionnaires the Commission distributed to United States importers and producers. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 16. Both questionnaires state that the stainless steel butt-weld pipe fittings it investigates are provided for in subheading 7307.23.00 of the HTSUS. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at Exhibits 5 and 6. Because subheading 7307.23.00 does not provide for cast pipe fittings, it appears the Commission did not investigate their effects on the domestic industry.

The Defendant, however, argues that the Commission's questionnaires are non-record evidence pursuant to 19 U.S.C. § 1516a(b)(2)[4] and, therefore, are not properly cited by the Plaintiff. *See* Def.'s Mem. Opp'n to Mot. J. Agency R. at 23–25. The Court does not need to determine the status of the questionnaires, however, because the Commission also included the welded (not cast) tariff classification in describing the scope of its injury investigation in its final determination. *See* ITC Final Determination at I–9. In response to the Commission's reference to HTSUS subheading 7307.23.00, the Defendant argues that, because "Commerce is not bound by tariff classifications in reaching a scope determination[,] * * * the fact that the Commission referenced a tariff classification is immaterial." Def.'s Mem. Opp'n to Mot. J. Agency R. at 26–27. Defendant's argument, however, is totally unresponsive to Eckstrom's contention that the Commission never investigated cast pipe fittings. Therefore, substantial evidence does not support Commerce's conclusion that the Commission's injury investigation unambiguously includes cast pipe fittings.

2. Commerce's Investigation

Commerce's Initiation Notice and Preliminary Determination arguably cover Eckstrom's cast pipe fittings. Each define the scope of the investigation in the following manner: "[t]he products subject to these investigations are certain stainless steel butt-weld pipe-fittings, whether finished or unfinished, under 14 inches inside diameter." Moreover,

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[4] The statute defines the record for review as "a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding[.]" 19 U.S.C. § 1516a(b)(2).

each lists the prevention of corrosion of the piping system as an application of the subject pipe fittings. *See* Initiation Notice at 26,645; Preliminary Notice at 61,048. Finally, these documents list the five most basic shapes of stainless steel butt-weld pipe fittings: elbows, tees, reducers, stub ends, and caps. *See id.* Eckstrom's cast pipe fittings are both stainless steel pipe stub ends used for corrosive applications in the food or pulp industries. Therefore, Commerce's initial investigation arguably included them.

Each of these documents, however, also states that the pipe fittings "subject to these investigations are classifiable under subheading 7307.23.00 of the [HTSUS]." *Id.* Again, subheading 7307.23.00 covers welded—not cast—pipe fittings. Although Commerce in each case provided a disclaimer indicating that the HTSUS subheading was referenced for convenience and was not dispositive, *see id.*, its inclusion may add ambiguity as to whether cast pipe fittings were included in the investigation, especially given that none of these documents specifically reference pipe fittings that are cast.

Moreover, the Final Determination differs from the Initiation Notice and from the Preliminary Determination in one key respect: the second sentence of its scope states "[c]ertain *welded* stainless steel butt-weld pipe fittings[.]" Final Determination at 28,556 (emphasis added). The use of the adjective "welded" to modify "stainless steel" makes the conclusion (that cast stainless steel butt-weld pipe fittings are within the scope) suspect. In addition, immediately following this scope statement, Commerce placed "pipe fittings" within a parenthetical. *Id.* Thereafter, Commerce referred simply to "pipe fittings" when defining the scope. *Id.* Because "pipe fittings" as defined by Commerce refers only to *welded* stainless steel pipe fittings, all of Commerce's subsequent descriptions of pipe fittings can refer only to welded pipe fittings, including the following sentence: "[t]he pipe fittings subject to these investigations are classifiable under subheading 7307.23.00 of the [HTSUS]." *Id.* The addition of the term "welded" in the second sentence and the repeated use of the reference to welded pipe fittings render the first sentence of the scope definition in the Final Determination, which omits the adjective "welded," ambiguous.[5]

3. Conclusion

Accordingly, Commerce's determination that the scope of the initial investigations unambiguously includes cast pipe fittings is not supported by substantial evidence.

C. The Final Determinations

1. The Commission

In its final determination, the Commission states that it determined "that an industry in the United States is materially injured by reason of

[5] Again, like the Initiation Notice and Preliminary Determination, the first sentence of the Final Determination states, "[t]he products subject to this investigation are certain stainless steel butt-weld pipe fittings, whether finished or unfinished, under 14 inches inside diameter." Final Determination at 28,556.

imports from Taiwan of certain stainless steel butt-weld pipe fittings, whether finished or unfinished, under 14 inches inside diameter, provided for in subheading 7307.23.00 of the [HTSUS.]" *Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan*, USITC Pub. 2641, Inv. No. 731–TA–564 (Final)(June 1993) at 1. Again, the Commission references the subject imports by HTSUS subheading 7307.23.00. *See* ITC Final Determination at I–9. Moreover, the Commission states that the subject pipe fittings "are usually designated under the performance specifications of ASTM A403/A403M–1991[.]" *Id.* at I–7. Finally, in describing the manufacturing process, the Commission notes that the subject pipe fittings are either cold-formed or hot-formed from stainless or welded pipe. *See id.* at I–6.

Again, the Defendant argues that the tariff classification reference is immaterial because Commerce is not bound by tariff classifications. *See* Def.'s Mem. Opp'n to Mot. J. Agency R. at 26–27. The appropriate question, however, is not whether Commerce is bound by the Commission's use of an HTSUS subheading, but whether the Commission included cast pipe fittings in its final determination. That the Commission referenced the scope of its investigation by a tariff classification that excludes cast fittings tends to support the conclusion that it did not. Moreover, although the Commission's final determination merely states that the subject fittings are only "usually" designated under specification ASTM A403/A403–1991, Eckstrom points out that the Commission does not reference a single specification that is applicable to cast fittings. *See* Pl.'s Reply Mem. Supp. Mot. J. Agency R. at 10–11. Finally, the final determination itself never specifically refers to cast pipe fittings.

Accordingly, this Court cannot conclude that the Commission's final determination unambiguously includes Eckstrom's cast pipe fittings.

2. Commerce

The first sentence of the Scope of Order states, "[t]he products subject to this investigation are certain stainless steel butt-weld pipe fittings, whether finished or unfinished, under 14 inches inside diameter." Amended Final Determination at 33,250. In addition, the second paragraph of the Scope of Order states that "[t]he subject merchandise is used where * * * [c]orrosion of the piping system will occur if material other than stainless steel is used[.]" *Id.* Arguably, Eckstrom's cast pipe fittings could fall within this scope definition.

Commerce, however, entitled the Amended Final Determination containing the Scope of Order, "Certain *Welded* Stainless Steel Butt-Weld Pipe Fittings From Taiwan." *Id.* (emphasis added). Again, use of the adjective "welded" to modify "stainless steel" precludes the possibility that cast pipe fittings are referenced.

Moreover, the second sentence of the Scope of Order also describes the subject imports as "[c]ertain *welded* stainless steel butt-weld pipe fittings (pipe fittings)[.]" *Id.* (emphasis added). As with the Final Determination, the use of the parenthetical, pipe fittings, throughout the remainder of the Scope of Order's text to designate the subject imports

means that every subsequent modification of "pipe fittings" cannot refer to pipe fittings that are cast. The Defendant argues that, Eckstrom's reliance on the use of the adjective "welded" in the Amended Final Determination's title and the second sentence of the Scope of Order is based only on "isolated words and phrases." *See* Def.'s Mem. Opp'n to Mot. J. Agency R. at 30. To the contrary, in making its argument, Eckstrom has noted the tariff classification, product specification, and applicable manufacturing process referenced by the petitioner, the Commission, and Commerce throughout the investigation. Rather, it is the Defendant who relies on the isolated sentence, "[t]he products subject to this investigation are certain stainless steel butt-weld pipe fittings[,]" without pointing to a single specific reference to cast pipe fittings.

The Scope of Order also states, "[t]he pipe fittings subject to these investigations are classifiable under subheading 7307.23.00 of the [HTSUS]." Amended Final Determination at 33,250. Again, Eckstrom points out that subheading 7307.23.00 does not apply to pipe fittings that are cast as opposed to welded. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 20–21.

In rebuttal, the Defendant relies on *Smith Corona Corp. v. United States*, 8 Fed. Cir. (T) 180, 915 F.2d 683 (Fed. Cir. 1990). In *Smith Corona*, the appellants sought a determination that their imports were not within the scope of an antidumping order. *Id.* at 182, 915 F.2d at 685. In that case, however, while the tariff classification remained the same throughout the investigation and the period following the final determination, the appellants' imports had been modified following the final scope order. *See id.* at 183, 915 F.2d at 686. The modified product was found to be within the tariff classification referenced in Commerce's final antidumping duty order. *See id.* Therefore, the imports were found to be within the scope of the order. *See id.* Here, the referenced tariff classification has never applied to cast pipe fittings, and Eckstrom's imports have never been modified in such a way as to be found within the classification's scope.

The Court notes the holding of *Wirth Limited v. United States*: "[t]he inclusion of various HTSUS headings in a petition ordinarily should not be interpreted to exclude merchandise determined to be within the scope of the antidumping * * * duty order[] but classified under an HTSUS heading not listed in the petition." 22 CIT at ____, 5 F. Supp.2d at 977–78. In *Wirth*, as here, an importer challenged Commerce's finding that its imports were within the antidumping duty order's scope, and Commerce disclaimed that its written description of the order's scope, rather than its references to tariff classifications, was dispositive.[6] *See id.* at ____, 5 F. Supp.2d at 970–71.

Eckstrom, however, does not argue that Commerce is *bound* by the tariff classification in the Scope of Order. *See* Pl.'s Reply Mem. Supp.

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[6] Unlike the current matter, however, the importer's product in *Wirth* was reclassified after the final determination to be within the tariff classifications referenced in the order. *See Wirth*, 22 CIT at ____, 5 F. Supp.2d at 972.

Mot. J. Agency R. at 10, 12. Rather, Eckstrom argues that the referenced tariff classification provides further evidence that cast pipe fittings were not within the order's scope. *See id.* at 12; *see also Smith Corona*, 8 Fed. Cir. (T) at 184, 915 F.2d at 687 (holding that although a reference to a tariff classification in a final order is not dispositive, "it is a factor to be considered, along with all factors pertinent to the issue of the intended scope of the order[]"); *Wheatland*, 21 CIT at ____, 973 F. Supp. at 157 ("While Commerce is not required to conform its scope determinations to classification categories * * *, use of tariff classifications to define scope is not prohibited and may serve Commerce's purposes, including administrative convenience.").

The first sentence of the Scope of Order is general enough to include cast pipe fittings. Moreover, cast pipe fittings are used where corrosion of the piping system will occur if material other than stainless steel is used. The use of the adjective "welded" in the title of the Amended Final Determination and in the second sentence of the Scope of Order, however, appears to exclude cast pipe fittings. Furthermore, the Scope of Order defines "pipe fittings" as "certain welded stainless steel butt-weld pipe fittings," and references a tariff classification that specifically excludes cast pipe fittings. Therefore, the Court finds that the final antidumping duty order's scope is ambiguous.

3. Conclusion

Based on these findings, Commerce's determination in its Final Scope Ruling that the final determinations unambiguously include cast pipe fittings is not supported by substantial evidence.

CONCLUSION

Commerce's scope determination was conducted in accordance with law. Commerce followed the applicable regulation, 19 C.F.R. § 351.225(k)(1), in evaluating whether the descriptions of the merchandise in the petition, initial investigation, and final determinations are dispositive in including Eckstrom's imports within their scope. Moreover, Commerce has authority to interpret and clarify its antidumping duty order, though not to impermissibly expand its scope.

Commerce's determination that the § 351.225(k)(1) criteria are dispositive, however, is not supported by substantial evidence. The descriptions of the merchandise contained in the petition, the initial investigation, and the final determinations do not unambiguously include cast pipe fittings within their scope. Similarly, however, the Plaintiff has not adequately demonstrated that the § 351.225(k)(1) criteria are dispositive in *excluding* cast pipe fittings.[7] Therefore, the Court remands the matter to Commerce to reconsider its determination and, if necessary, to conduct a formal scope inquiry employing the criteria listed at § 351.225(k)(2).

[7] Despite the considerable evidence put forth by the Plaintiff, the Court cannot, at this stage, determine that the § 351.225(k)(1) criteria unambiguously exclude Eckstrom's imports because two of the key identifiers listed in each of the documents are seemingly broad enough to include cast pipe fittings. That is, cast pipe fittings are both: 1) stainless steel butt-weld pipe fittings under fourteen inches inside diameter and 2) used in corrosive applications.

In accordance with the foregoing, if Commerce conducts a formal scope inquiry, its determination shall be completed pursuant to 19 C.F.R. § 351.225(f). Otherwise, Commerce shall complete its remand determination by **Monday, December 28, 1998**; any comments or responses are due by **Wednesday, January 27, 1999**; and any rebuttal comments are due by **Thursday, February 11, 1999**.

(Slip Op. 98–151)

EARTH ISLAND INSTITUTE ETC. ET AL., PLAINTIFFS *v.*
MADELINE K. ALBRIGHT ETC. ET AL., DEFENDANTS

Court No. 94–06–00321

(Dated November 4, 1998)

ORDER

AQUILINO, JR., *Judge:* The court in slip op. 96–165, 20 CIT ___, 942 F.Supp. 597 (1996), having ordered enforcement of the terms and conditions of 16 U.S.C. §1537 note (1989), as enacted by Congress, and awarded the plaintiffs reasonable attorneys' fees and expenses and costs pursuant to the Endangered Species Act, 16 U.S.C. §1540(g); and the defendants and intervenor-defendant having appealed slip op. 96–165 to the United States Court of Appeals for the Federal Circuit, which opined, 147 F.3d 1352 (1998), that this court lacked jurisdiction to order enforcement after the plaintiffs sought to withdraw their motion therefor and that attorneys' fees and expenses and costs could not be awarded pursuant to the Endangered Species Act in the light of *Bennett v. Spear*, 520 U.S. 154 (1997); and the court of appeals having vacated slip op. 96–165 and having remanded the case for a determination of whether an award of fees under the Equal Access to Justice Act, 28 U.S.C. §2412, would be appropriate; and the parties having appeared before this court on September 2, 1998 in regard to the order of remand and having been afforded additional time to supplement the record herein; and counsel for the plaintiffs and the defendants having filed on November 2, 1998 a Joint Stipulation as to Attorney's Fees and Costs, providing, among other things, that the defendants pay to the plaintiffs the amount of $300,000.00 in full satisfaction of any attorneys' fees and costs incurred by them during the course of this case and that the defendants expedite payment thereof and thereby resolve that remaining, fee issue in this case; and the plaintiffs and the defendants having proposed entry of an order in conformity with their stipulation; Now therefore, after due deliberation, it is hereby

ORDERED that the defendants pay to the plaintiffs the amount of $300,000.00 in conformity with the terms and conditions set forth in the aforesaid Joint Stipulation as to Attorney's Fees and Costs filed herein on November 2, 1998.

(Slip Op. 98–152)

CAMARGO CORREA METAIS, S.A., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND AMERICAN ALLOYS, INC., GLOBE METALLURGICAL, INC., AMERICAN SILICON TECHNOLOGIES (FORMERLY SILICON METALTECH, INC.), AND SIMETCO, INC., DEFENDANT-INTERVENORS

Consolidated Court No. 91–09–00641

[The Court considers the Department of Commerce's Final Results of Redetermination Pursuant to Court Remand with respect to the one remaining issue in an antidumping duty determination. *Held:* The Final Results of Redetermination Pursuant to Court Remand are consistent with the remand order and are affirmed.]

(Decided November 5, 1998)

Rogers & Wells (William Silverman and Ryan Trainer) for plaintiff Camargo Correa Metais, S.A.

Law Offices of Royal Daniel, III (Royal Daniel, III and Jeri Beth Katz) for plaintiffs Companhia Brasiliera Carbureto de Calcio, Rima Eletrometalurgica, S.A., and Ligas de Aluminio, S.A.

Frank W Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Jeffrey Telep and Reginald T. Blades, Jr.);* of counsel: Rebecca Rejtman, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Baker & Botts (William D. Kramer, Charles M. Darling, IV, and Martin Schaefermeier) for defendant-intervenors.

OPINION

BACKGROUND

MUSGRAVE, *Judge:* This case arises from an affirmative antidumping duty determination conducted by the U.S. Department of Commerce, International Trade Administration ("Commerce"), and published in the *Final Determination of Sales at Less Than Fair Value: Silicon Metal from Brazil*, 56 Fed. Reg. 26,977 (1991) ("Final Determination"). Plaintiffs Camargo Correa Metais, S.A., Companhia Brasiliera Carbureto de Calcio ("CBCC"), Rima Eletrometalurgia, S.A., and Ligas De Aluminio S.A., Brazilian producers of silicon metals who export their product into the U.S. market, challenged the Final Determination in a consolidated action. *Camargo Correa Metais, S.A. v. United States, et al.*, 17 CIT 897 (1993) *("Camargo I").* Following successive remand orders and determinations, the Court distilled the case to one issue and remanded that issue to Commerce for redetermination. *Camargo Correa Metais, S.A. v. United States, et al.*, 21 CIT ____, Slip Op. 97–159 (November 25, 1997) *("Camargo II").* Commerce's completed Final Results of Redetermination Pursuant to Court Remand are now before the Court.

STANDARD OF REVIEW

In reviewing antidumping determinations, the Court "shall hold unlawful any determination, finding, or conclusion found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988).

DISCUSSION

The lone remaining issue applies only to CBCC, against which company an antidumping duty order issued in the original Final Determination. In the Final Determination, Commerce concluded that certain value added taxes, called "ICMS" in the Brazilian system, paid on material inputs of CBCC's exported products were not remitted or refunded upon exportation, and therefore included ICMS values in calculating constructed value ("CV"). Final Determination at 26,984.

In *Camargo I*, CBCC challenged Commerce's treatment of ICMS. CBCC contended that its ICMS liability qualified as an internal tax remitted or refunded on export and should not be included in the CV determination. In the Brazilian system, ICMS paid is not directly remitted upon export but rather, by reason of the exportation, creates a credit for a company to use against further and future ICMS liability in its home market. CBCC received a substantial credit due to its export activity and argued that this constituted a remittance or refund. The Court agreed with this interpretation and with CBCC's argument that the constructed value provision requires the exclusion of remitted-on-export taxes such as the ICMS. *See Camargo I*, 17 CIT at 909–10.

The CV calculation is only part of the antidumping investigation, however. Once CV is established, it must be compared to the U.S. price ("USP") charged for the goods in question, and the difference between the two, after certain adjustments, sets the dumping margin. In this case, the fact that the USP provision required the inclusion in USP of any tax remitted or refunded by reason of export created a controversy. The constructed value provision then in effect, 19 U.S.C. § 1677b(e)(1)(A) (1988), required the exclusion from CV of remitted or refunded taxes, while the USP provision, 19 U.S.C. §1677a(d)(1)(C) (1988), required the increase of USP by the amount of the tax remitted or refunded in the home market. "To include the amount of tax not collected by reason of export in the USP and exclude the same amount from constructed value results in a reduction of dumping duties of twice the amount of the tax. This is double counting." *Id.* at 910. The Court found that Commerce's inclusion of ICMS in CV was unsupported by substantial evidence and remanded the issue with instructions to consider the ICMS to be a remitted or refunded tax for purposes of the CV statute and to propose a method for avoiding the double counting problem. *Id.*

On remand, Commerce recalculated CBCC's CV figures exclusive of ICMS. Final Results of Redetermination Pursuant to Court Remand (December 13, 1993) ("1993 Final Remand Results"). The Court affirmed the 1993 Final Remand Results but did so without opinion. *Camargo Correa Metais, S.A. v. United States*, 18 CIT 330 (1994). Defendant-intervenors, the U.S. producers of silicon metal, appealed this Court's decision, and, because this Court affirmed without opinion, the Court of Appeals for the Federal Circuit ("CAFC") vacated the Court's Judgment for failure to state the findings of fact or conclusions of law upon which the Judgment was made, and remanded the case to

this Court. *Camargo Correa Metais, S.A. v. United States*, 13 Fed. Cir. (T) ____, 52 F.3d 1040 (1995).

This Court was prepared to give its reasons for affirming the 1993 Final Remand Results, but Commerce changed its position on the ICMS issue after the remand from the CAFC. The 1993 Final Remand Results had excluded ICMS from CBCC's CV calculation. However, after the remand from the CAFC to this Court, Commerce sought a rehearing in which it sought to have its original methodology from the Final Determination, in which Commerce included ICMS in CV, reinstated. Commerce argued, contrary to the Court's ruling in *Camargo I*, that the ICMS is not remitted or refunded upon export. *Camargo II*, 21 CIT at ____, Slip Op. 97–159 at 23–4. The Court again found that the ICMS is a tax remitted or refunded by reason of export and remanded the issue to Commerce with instructions to: "(1) consider the [ICMS] to be a rebate or remittance for purposes of the cited statutes, (2) propose a method to eliminate or account for the double counting problem, and (3) recalculate the dumping margin for plaintiff CBCC accordingly." *Id.* at 28.[1]

Commerce has completed and submitted its latest remand results and has now excluded ICMS from CV. Final Results of Redetermination Pursuant to Court Remand (March 25, 1998) ("1998 Final Remand Results"). Commerce, quoting extensively from *Camargo II*, now agrees with this Court's finding that the ICMS tax credit is the equivalent of a rebate or remittance for purposes of determining CV. The CV statute demands that such remittances or rebates be excluded from the CV calculation:

> [T]he constructed value of imported merchandise shall be the sum of—
>
> > (A) the cost of materials (exclusive of any internal tax applicable directly to such materials or their disposition, but remitted or refunded upon exportation of the article * * *).

19 U.S.C. § 1677b(e)(1)(A) (1988). Thus Commerce excludes CBCC's ICMS liability from its constructed value calculation. This result is consistent with Commerce's findings in its 1993 Final Remand Results and would have been affirmed accordingly in *Camargo II* but for Commerce's unsupportable change of position.[2] The Court finds that Commerce has complied with and satisfied the first remand instruction.

Commerce also argues that the USP statute itself provides a resolution for the double counting problem. Commerce's position takes into account both the uniqueness of the ICMS system[3] and the fact that the

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[1] The Court affirmed Commerce's 1993 Final Remand Results "in all respects except the treatment of ICMS as to plaintiff CBCC." *Id.*

[2] The Court notes that Commerce's change in position may have been influenced by changes in the statutes wrought after the commencement of this case. In 1994, in between *Camargo I* and *II*, Congress altered the nomenclature used in antidumping investigations and focused adjustments exclusively on the foreign market value (for which constructed value was a surrogate), now referred to as "normal value," calculation. Recognizing the potential conflict in the previous statutes—precisely those controlling this case—Congress stated that the changes in the new statutes "expressly preclude[ ] the double-counting of adjustments." S. Rep. No. 412, 103rd Cong., 2nd Sess., at 70 (1994). However, Commerce was still bound by the previous statutory language.

[3] For a discussion on the Brazilian value added tax system, *see Camargo II* at 16–17, 23–28.

ICMS is a remittance or refund not collected by reason of export. The USP provision requires that USP be

> (1) increased by
>
> > (C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation.

19 U.S.C. § 1677a(d)(1)(C) (1988). The ICMS is not remitted, refunded or rebated at the moment of exportation; rather, it accrues as a credit that is then used to off-set other ICMS liabilities due on products and inputs purchases in the home market. Thus, ICMS taxes rebated by virtue of exportation are not "added to or included in the price of such or similar merchandise when sold in the country of exportation" as required for invoking the USP provision. "Where, as here, there is no tax paid by home market customers that is added to or included in CV, there is no statutory basis for increasing U.S. price." 1998 Final Remand Results at 6. While this may be a result applicable only to the unusual Brazilian system, it is yet a result that avoids the double counting problem. The Court finds that Commerce has complied with and satisfied the second remand instruction.

The Court again notes that this result was achieved by Commerce's 1993 Final Remand Results and would have been an effective avoidance of any conflict between the statutory provisions had Commerce not reversed itself in *Camargo II*. In the 1993 Final Remand Results, Commerce excluded from CV CBCC's ICMS taxes paid on material inputs, and correspondingly did not increase USP. Despite Commerce's advancement of a contrary position before this Court in *Camargo II*, the dumping margin calculation for CBCC from the 1993 Final Remand Results has gone unchanged. Commerce notes this in its 1998 Final Remand Results and states that no recalculation of CBCC's antidumping duty margin is required. 1998 Final Remand Results at 7. The Court agrees and finds that Commerce has complied with and satisfied all three of the remand instructions.

CONCLUSION

For the foregoing reasons, the Court affirms the Department of Commerce's 1998 Final Results of Redetermination Pursuant to Court Remand.

(Slip Op. 98–153)

SWISHER INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–03–00322

[Partial summary judgment for defendant.]

(Dated November 6, 1998)

McKenna & Cuneo, L.L.P. (Peter Buck Feller, Joseph F. Dennin, and *Daniel G. Jarcho)* for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Jeanne E. Davidson, Todd M. Hughes*, and *Lara Levinson*), *Richard McManus* Office of the Chief Counsel, United States Customs Service, of counsel, for defendant.

Neville, Peterson & Williams (John M. Peterson, George W. Thompson, Lawrence J. Bogard, and *Michael K. Tomenga)* for amici curiae Totes-Isotoner, Inc., et al.

OPINION

Restani, *Judge:* This action seeking recovery of Harbor Maintenance Taxes (HMT) pursuant to 28 U.S.C. § 1581(a) (1994) (jurisdiction over denial of protest by Customs Service) is before the court on cross motions for summary judgment.

FACTS

Swisher International, Inc. paid HMT on a quarterly basis from the fourth quarter of 1990 through the second quarter of 1994. Swisher filed refund requests on Customs Form 350 on the basis that the statute imposing HMT on exports is unconstitutional. The refund requests were denied on October 26, 1994. On November 21, 1994 Customs promulgated specific procedures for filing protests challenging the constitutionality of HMT on exports. *See User Fee Protests*, 59 Fed. Reg. 60044 (Dep't Treasury 1994). On November 23, 1994 Swisher protested the denial in the manner instructed by Customs. Swisher requested an accelerated disposition of the protest under 19 U.S.C. § 1515(b) (1994) on February 24, 1995. Swisher then filed this action on March 29, 1995, which was three days after the protest would have been denied by operation of law, *see* 19 U.S.C. § 1515(b), if the protest had been one of the protestable decisions listed in 19 U.S.C. § 1514(a) (1994).

The HMT statute was declared unconstitutional as applied to foreign exports, as are at issue here. *U.S. Shoe Corp. v. United States*, 118 S. Ct. 1290 (1998). In *U.S. Shoe*, the Supreme Court found that jurisdiction lay

under 28 U.S.C. § 1581(i) (1994).[1] *Id.* at 1293–94. The applicable statute of limitation is 28 U.S.C. § 2636(i) (1994),[2] which permits suit to be commenced within two years of payment of the tax. *See Stone Container Corp. v. United States*, Slip Op. 98–143, No. 96–10–02366 (Ct. Int'l Trade Oct. 5, 1998). Thus, some of plaintiff's claims will be timed barred unless jurisdiction is also cognizable under 28 U.S.C. § 1581(a).

Swisher participated as an *amicus curiae* before both this court and the Court of Appeals for the Federal Circuit, raising its refund protest denial theory, but as it was not a party it could not obtain a definitive disposition of its theory.[3] The court addresses it now.

DISCUSSION

The Supreme Court recognized jurisdiction over suits to recover HMT on exports as lying under 28 U.S.C. § 1581(i), the residual jurisdiction of the court. *U.S. Shoe*, 118 S. Ct. at 1293–94. Section 1581(i) applies if none of the other sections of 28 U.S.C. § 1581 are available for relief. *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied* 484 U.S. 1041 (1988) (citing cases). This means that if one had the opportunity for access to the court under 28 U.S.C. § 1581(a),[4] albeit after exhausting mandatory administrative remedies, there is no § 1581(i) jurisdiction. *Lowa, Ltd. v. United States*, 5 CIT 81, 88, 561 F. Supp. 441, 446–47 (1983), *aff'd*, 724 F.2d 121 (Fed. Cir. 1984).

Of course, it is possible that there is an exception to the long line of case law on this point because of the uniqueness of a suit based on exports, as opposed to imports, the normal subject matter of the court. The court finds this not to be the case. In fact, it is this uniqueness which reinforces the applicability of the standard jurisprudence. Section 1581(i) provides jurisdiction because recovery of HMT on the basis of the statute's unconstitutionality cannot be shoe-horned into Customs' protest procedures. What may be protested is a decision of Customs falling with-

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[1] Section 1581(i) of Title 28 provides in relevant part:

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

[2] Section 2636 of Title 28 provides in relevant part:

Time for commencement of action

* * * * * * *

(i) A civil action of which the Court of International Trade has jurisdiction under section 1581 of this title, other than an action specified in subsections (a)–(h) of this section, is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues.

[3] *See U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1570 (Fed. Cir. 1997) (finding jurisdiction under 28 U.S.C. § 1581(i), and not § 1581(a), and leaving open issue of whether a protest U.S. Shoe might have filed would have altered this finding).

[4] Section 1581(a) of Title 28 provides:

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

in the categories set forth in 19 U.S.C. § 1514(a).[5] Swisher alleges that Customs' "decision" to deny its refund request was a decision regarding the "amount of duties chargeable" or a "charge or exaction."

First, and most importantly, *U.S. Shoe*, 118 S. Ct. at 1293–94, makes clear that there is no protestable Customs decision with respect to the constitutionality of HMT. It would be incongruous to permit conversion of "no decision" into a protestable decision, by means of the unilateral choice of the exporter to seek a refund at any time of its choosing. There are no time limits for the request or for the Customs decision thereon under 19 C.F.R. § 24.24(e)(5) (1997), which provides for HMT refund requests. Interpretation of the law to put control of the setting of limitations periods in the hands of one party to the dispute is disfavored. *United States v. Cocoa Berkau Inc.*, 990 F.2d 610, 614 (Fed. Cir. 1993) ("we cannot 'permit a single party to postpone unilaterally and indefinitely the running of the statute of limitations'.") (quoting *United States v. Commodities Export Co.*, 972 F.2d 1266, 1271 (Fed. Cir. 1992)).

Second, it is clear that no liquidation is involved. At most, plaintiff analogizes the denial of the refund request to a liquidation, but it is not a liquidation as that term is understood—the final determination of import duties. *See* 19 C.F.R. § 159.1 (1998) ("liquidation means the final computation or ascertainment of the duties or drawback accruing on an entry."). It is a liquidation which settles "the amount of duties owing." It is also "charges or exactions" that merge into liquidation which are protestable. *United States v. Utex International, Inc.*, 857 F.2d 1408, 1414 (Fed. Cir. 1988) ("[19 U.S.C. § 1514 and 28 U.S.C. § 2637] relate to the exhaustion of administrative remedies with respect to liquidation of the entry, as a prerequisite to judicial review of any of the items subsumed in liquidation."). *See also United States v. Ataka America, Inc.*, 17 CIT 598, 606, 826 F. Supp. 495, 502 (1993) (customs action merging into liquidation, "must be protested to avoid finality"). *Utex* and *Ataka* are fully consistent with the traditional definition of charge or exactions as "specific sums of money (other than ordinary customs duties) on *imported* merchandise." *Alberta Gas Chemicals, Inc. v. Blumenthal*, 82 Cust. Ct. 77, 82, 467 F. Supp. 1245, 1249–50 (1979) (emphasis added). *Utex* and *Ataka* are also reconcilable with *Norfolk & Western Railway v. United States*,

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[5] Section 1514(a) of Title 19 provides in relevant part:

(a) Finality of decisions; return of papers

Except as provided in subsection (b) of this section, section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by domestic interested parties), section 1520 of this title (relating to refunds and errors), and section 1521 of this title (relating to reliquidations on account of fraud), decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—

(1) the appraised value of merchandise;
(2) the classification and rate and amount of duties chargeable;
(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
(4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
(5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;
(6) the refusal to pay a claim for drawback; or
(7) the refusal to reliquidate an entry under section 1520(c) of this title;

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of Title 28 within the time prescribed in section 2636 of that title.

18 CIT 55, 843 F. Supp. 728 (1994), *aff'd*, 62 F.3d 1395 (Fed. Cir. 1995) (user fee on vehicles and vessels protestable), as the fees in *Norfolk* were intimately connected to importation. *General Motors Corp. v. United States*, 10 CIT 569, 643 F. Supp. 1139 (1986) is similar and protestability was a more central issue in that case. *See also Carlingswitch, Inc. v. United States*, 68 C.C.P.A. 49, 55, 651 F.2d 768, 773 (1981) ("refusals to refund money" are not 19 U.S.C. § 1514 "charges or exactions.") Thus, it appears there is nothing which may be protested as a prerequisite to 28 U.S.C. § 1581(a) jurisdiction in this case.

Further, while Customs may provide refund and "protest" procedures for the convenience of the parties, if such administrative procedures are not mandatory, they will not toll the statute of limitations. *See Cocoa Berkau*, 990 F.2d at 615–16 (28 U.S.C. § 2415(a) not tolled by permissive administrative proceeding); *Ataka America, Inc.*, 17 CIT at 605, 826 F. Supp. 495, 501–02 (same). Because administrative procedures have been found not to be mandatory as to challenges to the unconstitutionality of HMT on exports, *see U.S. Shoe*, 118 S. Ct. at 1293, they do not toll the statute. As indicated in the discussion of liquidation, *supra*, even as to questions of interpretation of the HMT statute itself or with regard to factual questions as to HMT on exports, 28 U.S.C. § 1581(a) protest denial jurisdiction is in doubt.

Plaintiff, however, relies heavily on Customs' alleged authority to issue protestable refund decisions under 19 C.F.R. § 24.24(e)(5) (1997), and to case law finding protest necessary for the full array of legal issues arising out of a refund denial.[6] While Customs may have the authority to make decisions with regard to HMT amount, as opposed to the constitutionality of the statute, as indicated it is not at all clear that the mandatory protest procedures of 19 U.S.C. § 1514(a) apply to even such limited decisions, where exports are involved. It may be that for such cases 28 U.S.C. § 1581(i) is the applicable jurisdictional provision. The remedy under 19 C.F.R. § 24.24(e)(5) may be read as the type of remedy which should be exhausted if Customs may make a meaningful, that is, non-futile decision. *See* 28 U.S.C. § 2637(d) (1994) (court has discretion to require exhaustion in various cases including those brought under 28 U.S.C. § 1581(i)). It may be, however, that there is no regulatory time limit precisely because the time limit is necessarily dictated by the statute of limitation applicable to 28 U.S.C. § 1581(i). In such a case the statute would continue to run until suit is filed. Thus, if a party which paid HMT on exports seeks a refund because of an ordinary dispute within Customs' jurisdiction, it should promptly request one from Customs. It

[6] The court does not take issue with the proposition that protests of 19 U.S.C. § 1514(a) decisions as to imports may raise constitutional issues. *See C.J. Tower & Sons of Buffalo, Inc. v. United States*, 34 Cust. Ct. 95, 135 F. Supp. 874 (1955) (reviewing protest involving Fifth Amendment challenge to tariff); *Star Kist Foods, Inc. v. United States*, 47 C.C.P.A. 52, 275 F.2d 472 (1959) (reviewing protest allegation that duty arose under unconstitutional statute). Nonetheless, *U.S. Shoe* made clear that this procedure is not mandated as to constitutional challenges to HMT on *exports*.

has not been determined, however, that such a request will toll the statute.[7]

Defendant opined at oral argument that the refunds referred to in 19 C.F.R. § 24.24(e)(5) are those described in 19 U.S.C. § 1520(c) (1994) and that refunds under that provision may be made for errors of fact only. Generally, Customs makes refunds of monies erroneously collected pursuant to 19 U.S.C. § 1520. Section 1520(c), which allows correction within one year of liquidation, is limited to factual error, but not all of 19 U.S.C. § 1520(a) is so limited. Subsections 1520(a)(1) and (a)(2) of Title 19 are potentially applicable.[8] Subsection (1), however, refers to liquidation of entries and subsection (2) refers to fees, charges, or exactions, but excludes taxes. Thus, it appears that 19 U.S.C. § 1520 does not apply to export tax refunds.[9] Even if 19 U.S.C. § 1520(a) could be read to apply to export taxes in some circumstances, it cannot be read to allow Customs to refund taxes owed under the terms of a statute, as these taxes were owed at the time the refund was requested. Customs could not refund the taxes because Customs could not declare the statute unconstitutional. Any refund procedures arguably permissible under 19 U.S.C. § 1520 did not apply to these attempts to recover HMT payments. Thus, assuming *arguendo* that decisions as to HMT on exports may be protestable decisions as to "amount of duties," "charges" or "exactions," and thus 28 U.S.C. § 1581(a) protest denial jurisdiction might be applicable in some HMT export situations, it is not applicable to this dispute over the constitutionality of the HMT statute.

In conclusion, the court finds whether or not some decisions with regard to HMT on exports are protestable within the meaning of 19 U.S.C. § 1514(a), there was no protestable decision giving rise to 28 U.S.C. § 1581(a) jurisdiction in this case. Furthermore, a plaintiff cannot unilaterally grant itself a new limitations period by making a refund request whenever it so chooses.

Plaintiff shall present an appropriate judgment sheet reflecting this opinion within twenty days hereof.

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[7] *Dicta* in *U.S. Shoe*, 19 CIT 1284, 1296, 907 F. Supp. 408, 418 (1995), *aff'd*, 114 F.3d 1564 (Fed. Cir. 1997), *aff'd*, 118 S. Ct. 1290 (1998), might be read to state that such limited decisions as to exports are protestable in the sense of 19 U.S.C. § 1514 and that jurisdiction would lie under 28 U.S.C. § 1581(a) for such decisions. That precise issue was not before the court. The concurring opinion indicates that the lack of time limits for decision making by Customs on refund requests under 19 C.F.R. § 24.24(e)(5) supports the view that this is not a mandatory procedure for purposes of 19 U.S.C. § 1514(a) and, thus, 28 U.S.C. § 1581(a) jurisdiction is lacking. *U.S. Shoe*, 19 CIT at 1302, 907 F. Supp. at 423 (Musgrave, J., concurring).

[8] The other subsections of 19 U.S.C. § 1520(a) cover fines and penalties, (a)(3), and clerical errors, (a)(4).

[9] Plaintiff agrees that 19 U.S.C. § 1520 does not apply, but rather argues that 19 C.F.R. § 24.24(e) provides all the refund authority needed. As explained *supra* in the text, the regulatory provision is insufficient to form a basis for jurisdiction in this action.

(Slip Op. 98–154)

U.S. STEEL GROUP—A UNIT OF USX CORP. AND BETHLEHEM STEEL CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND AG DER DILLINGER HÜTTENWERKE, DEFENDANT-INTERVENOR

Consolidated Court No. 97–05–00866

[Remand Determination remanded.]

(Dated November 6, 1998)

Dewey Ballantine LLP, (Michael H. Stein, Bradford L. Ward, and *Jennifer Danner Riccardi)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, *Delfa Castillo,* Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Erin Powell), Bernd G. Janzen,* Attorney-Adviser, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

LeBoeuf, Lamb, Greene & MacRae, L.L.P., (Pierre F. de Ravel d'Esclapon, Mary Patricia Michel, and *William C. Sjoberg)* for defendant-intervenor.

OPINION

Restani, *Judge:* This antidumping duty matter is before the court following remand in *U.S. Steel Group, et al. v. United States*, Slip Op. 98–96, No. 97–05–00866, 1998 WL 417411 (Ct. Int'l Trade July 7, 1998) *("U.S. Steel")*. Petitioners challenge the remand results with regard to the deductions of commissions in calculating constructed export price ("CEP").[1]

Section 1677a(d)(1)(A) of Title 19 requires a deduction for "commissions for selling the subject merchandise in the United States." 19 U.S.C. § 1677a(d)(1)(A)(1994). The Respondent before the Commerce Department ("Commerce") requested that the court order Commerce to eliminate the commission deduction simply because it was paid to a related party and was not found to be at arm's length. *U.S. Steel*, Slip Op. 98–96, at 9, 1998 WL 417411, at *4. The government, on the other hand, requested a remand because it believed that it might have deducted the actual expenses in calculating CEP, as well as commissions compensating the related parties for the same expenses. *Id.* at 37, 1998 WL 417411, at *14. Because the statute does not distinguish on the basis of mere relatedness, and because the government did not request (or support) a request for remand on that basis alone, the court granted a more limited remand. It permitted elimination of the commission deduction if (1) the expense did not exist, or (2) the expense represented by the deduction was otherwise accounted for. *Id.* at 38, 1998 WL 417411, at *14.

In preparing the draft remand results Commerce followed the court's directions exactly. It found that two commission payments existed. *Draft Results of Redetermination Pursuant to Court Remand, U.S. Steel v. United States, Slip Op. 98–96 (July 7, 1998), ("Draft Results"),* at 4.

[1] Recalculation of profit for CEP purposes on remand is not challenged.

These payments were made to related parties in connection with the U.S. sales which form the basis for the CEP calculations. One was from the manufacturer, AG der Dillinger Hüttenwerke ("Dillinger"), to French affiliate, Daval SA ("Daval"), and another was from Daval to U.S. affiliate, Francosteel Corporation ("Francosteel"). *Id.* The commission from Daval to Francosteel duplicated an actual indirect selling expense which was also deducted from CEP. *Id.* Commerce eliminated the duplicative commission deduction. *Id.* at 5.

In commenting on the draft remand results, Dillinger requested that the entire commission expense be eliminated. *Final Results of Redetermination Pursuant to Court Remand, U.S. Steel v. United States, Slip Op. 98–96 (July 7, 1998), ("Remand Determination")* at 6. Commerce agreed. It stated that it only deducts from CEP expenses associated with commercial activity *in the United States* that relate to resale to an unaffiliated purchaser. *Remand Determination* at 8 (emphasis added). As far as the court is able to determine from the *Remand Determination* and government counsel's explanation of them, the reason for the elimination of the Dillinger-Daval commission deduction is not duplicativeness, but rather because the expense was incurred in the home market (although it is associated with the U.S. sale).

This may or may not be a proper practice under the statute, under Commerce's new regulations, and in comparison to the methodology used for normal value in this case. The court, however, will not decide this issue because it was not raised prior to remand. The location of the commission expense (however that is determined) was not a distinction which any party asked the court to address prior to remand. There may be several acceptable ways to calculate CEP with respect to commissions. The only *error* revealed to the court prior to remand was the error of double-counting.

As the court has opined numerous times, finality is an important goal established by Congress in these matters. *See e.g. Wheatland Tube Co. v. United States*, 973 F. Supp. 149, 158 (Ct. Int'l Trade 1997) (underscoring the importance of finality in antidumping determinations). Furthermore, judicial economy and fairness to the parties require that all relevant arguments and explanations be presented the *first* time a matter is before the court. It is too late for Commerce or Dillinger to raise new arguments. Further, it is unclear that Commerce's original decision in regard to the Dillinger-Daval commission deduction was in error at the time it was made, even if the decision differs from an acceptable current practice.

Accordingly, Commerce is directed to issue the portion of the draft remand results related to the CEP commission deduction in its final remand determination.

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